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VOLUME 51 SEPTEMBER-DECEMBER 1981 NUMBER 4

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Errata

Page 252, line 6 should read: "A decree issued pursuant to a guardian's request for the sale of land owned by his ward is also void unless the procedure outlined in section 93-13-281 of the Mississippi Code is followed.[99]"

Footnote 99 should read: "*See* notes 50 and 96 *supra*."

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COMMENCING A CASE UNDER THE BANKRUPTCY REFORM ACT OF 1978: A PRIMER*

*R. Glenn Ayers***

INTRODUCTION

Enactment of the Bankruptcy Reform Act of 1978[1] [the Bankruptcy Code] with its simplified provisions has coincided with a general downturn in the American economy. The result has been a significant increase in the number of bankruptcy filings, both nationwide and in Mississippi.[2] Although many attorneys involved in these proceedings have experience in the bankruptcy field, others have had little exposure to bankruptcy practice. This article is a "primer," written to guide the novice attorney through the substantive and procedural shoals of bankruptcy.

This "primer" is not by any means a complete guide to the Bankruptcy Code. Rather, it is a detailed guide to the initiation of a proceeding under the Code. Only three subjects are covered: (1) the structure of the Code and alternative proceedings provided; (2) a description of those persons who may (or should) file bankruptcy; and (3) the pleadings necessary and procedures to be followed in commencing a case under the Code.

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* A preliminary version of this article was presented to a seminar on "Business Reorganizations Under the Bankruptcy Act of 1978," jointly sponsored by the Mississippi Institute for Continuing Legal Education and the Mississippi Bankruptcy Conference, March 27-28, 1980, Jackson, Mississippi.

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[1] 11 U.S.C. §§ 101-151326 (Supp. III 1979).

[2] During the 12 months preceding June 30, 1980, 360,960 bankruptcies were filed, an increase of 59.4% over the previous 12 month period. AD. OFF. U.S. CTS. 1980 ANN. REP. 8-9. Total bankruptcies filed in Mississippi increased from 2,654 to 3,265 for the same period. *Id.* at A-120, A-122; AD. OFF. U.S. CTS. 1979 ANN. REP. A-116.

The discussion is not limited to ordinary liquidation proceedings commenced under chapter 7[3] of the Code. Also considered in detail are the preliminary issues related to the filing of cases under chapter 11,[4] seeking reorganization, and cases under chapter 13,[5] asking for the "Adjustment of Debts of An Individual with Regular Income." The article will conclude with a description of the meeting of creditors, which is generally the first time the voluntary debtor[6] and his attorney actually appear at the bankruptcy bar.

Where useful, local rules or procedures adopted by Mississippi's bankruptcy judges are discussed. Complete sets of those local rules are appended to this article.[7]

I. The Structure of the Bankruptcy Code and the Alternative Proceedings Provided

Many attorneys are unfamiliar with the organization of the Code and the remedies it provides. This section should serve to acquaint attorneys with those matters.

A. The Structure of the Code

The structure of the Code is much simpler than that of the Act which it replaces. Like the Mississippi Code, it is divided into chapters with "odd only" numbers—1, 3, 5, 7, 9, 11, 13, and 15. Chapters 1, 3, and 5 are of general application. Chapter 1[8] contains sections dealing with definitional matters. Chapter 3 is entitled "Case Administration"[9] and includes provisions dealing with the commencement of a case, the officers of the bankruptcy court, the administration of the case, and the administrative powers given the bankruptcy judge and officers. Chapter 5 con-

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[3] 11 U.S.C. §§ 701-766 (Supp. III 1979).

[4] *Id.* §§ 1101-1174.

[5] *Id.* §§ 1301-1330.

[6] Persons and municipalities protected by the Bankruptcy Code are referred to as "debtors." *Id.* § 101(12). The term "bankrupt" is not used in the Code.

[7] *See* Appendix to this article. As of the date of this writing, Judge Glover Roberts, Bankruptcy Judge for the Southern District, had temporarily adopted Judge Barney E. Eaton's rules. Conversation between the author and bankruptcy court (July 15, 1981).

[8] 11 U.S.C. §§ 101-109 (Supp. III 1979).

[9] *Id.* §§ 301-366.

tains provisions dealing with creditors' rights, the debtor's powers and duties, and the property which comes into, or is excluded from, the bankruptcy estate.[10] The remaining chapters, except chapter 15, are devoted to the remedies available in bankruptcy: chapter 7 governs liquidation;[11] chapter 9 the bankruptcy of municipalities;[12] chapter 11 the reorganization of debtors;[13] and, as mentioned above, chapter 13 provides a special remedy for qualified individuals in the form of "Adjustment of Debts of an Individual with Regular Income."[14]

At present, chapter 15[15] applies only in the federal judicial districts in which the United States trustee system exists.[16] This system uses standing trustees employed by the Justice Department rather than court-appointed trustees.[17] The experiment, which expires automatically in five years,[18] was funded in the hope of determining whether a bureaucratic system would be more efficient than the existing scheme. The proponents expect the experiment to recover more for creditors and cost less in "no asset" cases.[19]

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[10] *Id.* §§ 501-554.

[11] *Id.* §§ 701-766.

[12] *Id.* §§ 901-946.

[13] *Id.* §§ 1101-1174.

[14] *Id.* §§ 1301-1330.

[15] *Id.* §§ 1501-151326.

[16] 28 U.S.C. §§ 581-589 (Supp. III 1979). Those districts include Colorado, Delaware, District of Columbia, Kansas, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, North Dakota, Rhode Island, South Dakota, and selected districts in Alabama, California, Illinois, New York, Texas, and Virginia. *Id.* § 581.

[17] The standing trustees were proposed to relieve bankruptcy judges of many of their administrative and supervisory roles and to serve as bankruptcy watchdogs to prevent fraud, dishonesty, and overreaching in the bankruptcy area. H.R. REP. No. 95-595, 95th Cong., 1st Sess. 4, 88 (1977), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5963, 5965-66, 6049.

[18] Act of Nov. 6, 1978, Pub. L. No. 95-598, Tit. IV, § 408(c), 92 Stat. 2687 provides that the United States Trustee System is automatically repealed on April 1, 1984. This notation appears as a preamble to 28 U.S.C. § 581 (Supp. III 1979) but was not codified as a part of that section.

[19] The United States trustee is required to recover assets for the benefit of creditors before they can be paid, which should cause the system to operate more for the benefit of creditors than administrators. H.R. REP., *supra* note 17, at 109. Further in "no asset" cases where there is no surplus available after liquidation to pay a private trustee, the United States trustee is available to expedite the proceedings by pursuing assets that might otherwise go undetected. *Id.*

B. The Remedies: Chapters 7, 11, and 13

The Code, like its predecessor, the Bankruptcy Act of 1898 [the Bankruptcy Act],[20] continues to offer qualified debtors a choice between liquidation and reorganization. Liquidations are governed by chapter 7,[21] business reorganizations by chapter 11,[22] and chapter 13 is available to an "individual with regular income" who wishes to propose an "adjustment" of his debts.[23] Petitioning creditors may file involuntary proceedings under chapter 7 or chapter 11.[24] Selection of the proper chapter is essential, and bankruptcy counsel must be familiar with both the legal and practical dimensions of this choice.

Section 109(b)[25] largely determines the technical, legal requirements. It provides that chapter 7 is available to any "person"[26] who is not:

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[20] The Bankruptcy Act, ch. 541, 30 Stat. 544 (1898) (repealed 1978), permitted six alternatives to liquidation:

(a) Section 77 of the Bankruptcy Act, 11 U.S.C. § 205 (1976) (amended 1978), provided for railroad reorganization. After the Rules of Bankruptcy Procedure were adopted, these were referred to as Chapter VIII proceedings;

(b) Chapter IX, §§ 81-98, 11 U.S.C. §§ 401-418 (1976) (amended 1978), provided debt adjustment for public subdivisions, agencies, and instrumentalities.

(c) Chapter X, §§ 101-276, 11 U.S.C. §§ 501-676 (1976) (amended 1978), provided for corporate reorganization under a court-appointed trustee. This was the most complex and comprehensive provision of the Act.

(d) Chapter XI, §§ 301-399, 11 U.S.C. §§ 701-799 (1976) (amended 1978), provided for arrangements of corporate and other qualified debtors. Most frequently used by businesses seeking "reorganization," it did not require trustee appointment.

(e) Chapter XII, §§ 401-526, 11 U.S.C. §§ 801-926 (1976) (amended 1978), provided for real property arrangements. Chapter XII bankrupts could not be corporations. Further, only debtors whose principal (or only) asset was realty were eligible for relief under Chapter XII.

(f) Chapter XIII, §§ 601-686, 11 U.S.C. §§ 1001-1086 (1976) (amended 1978), entitled "Wage Earners' Plans," provided for arrangements for wage earning individuals.

[21] 11 U.S.C. §§ 701-766 (Supp. III 1979).

[22] *Id.* §§ 1101-1174.

[23] *Id.* §§ 1301-1330. Chapter 13 may also be used to reorganize businesses so long as the business is a sole proprietorship.

[24] *Id.* § 303(b). Involuntary petitions under chapter 13 are not permitted. Further, an alleged debtor against whom a proceeding is filed must be eligible for treatment under both the Code and the particular chapter selected by the petitioning creditors. *Id.*; *see* text accompanying note 183 *infra*. No involuntary petition may be filed against either a farmer or a nonprofit corporation. *See* note 186 and accompanying text *infra*.

[25] 11 U.S.C. § 109(b) (Supp. III 1979).

[26] See text accompanying note 103 *infra* for a discussion of "person."

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union; or

(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union engaged in such business in the United States.[27]

Section 109(c) describes the municipalities which may file under chapter 9,[28] and section 109(d) states that persons eligible to use chapter 11 include all persons eligible to file under chapter 7, except stockbrokers and commodity brokers.[29] Further, railroads are permitted to seek relief (*i.e.*, reorganization) under chapter 11.[30] Excluded from chapter 7 and outside the scope of

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[27] 11 U.S.C. § 109(b) (Supp. III 1979). For a discussion of remedies available for domestic and foreign thrift insurance companies, see notes 124 through 126 and accompanying text *infra*.

[28] An entity is eligible for chapter 9 if it:

(1) is a municipality;

(2) is generally authorized to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;

(3) is insolvent or unable to meet such entity's debts as such debts mature;

(4) desires to effect a plan to adjust such debts; and

(5)(A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(C) is unable to negotiate with creditors because such negotiation is impracticable; or

(D) reasonably believes that a creditor may attempt to obtain a preference.

11 U.S.C. § 109(c) (Supp. III 1979).

[29] Stockbrokers and commodity brokers are limited to Chapter 7, for they are also excluded from chapter 13. *Id.* § 109(d) & (e). There is an interesting misprint in the current § 109(d). Presently, the subsection excludes "stockholders and commodity brokers." This will be corrected in the pending technical amendments bill to read "stockbrokers." S. 863, 97th Cong., 1st Sess. § 5(C) (1981).

An interesting question arises: Does present § 109(d) exclude any *stockholder* from filing in chapter 11? After all, the statutory language could not be clearer.

[30] 11 U.S.C. § 109(d) (Supp. III 1979). For the provisions dealing with railroad reor-

chapter 13,[31] railroad bankruptcies are thus limited to reorganization proceedings. This continues a longstanding public policy.[32]

Although chapter 11 is available to any "person," whether corporate or human, at least one bankruptcy judge has held that chapter 11 is available only to a debtor engaged in business. Judge Harold Lavien, in *In re Ponn Realty Trust*[33] has ruled that "[c]ertainly the legislative history can leave no doubt that Chapter 11 of the Bankruptcy Code was intended for utilization solely in the business setting and not in a consumer context. Indeed, . . . provisions within Chapter 11 itself would so indicate."[34] If Judge Lavien is correct, all nonbusiness arrangements of debt will be confined to chapter 13.[35]

Chapter 13 may be used only by "individuals with regular income" who owe less than $100,000 in "non-contingent, liquidated, unsecured debt" and less than $350,000 in "non-contingent, liquidated, secured debt."[36] Stockbrokers and commodity brokers are excluded here, just as they are from chapter 11.[37]

Although the debt limitation and broker exclusion provisions are reasonably straightforward, the limitation of chapter 13 to "individuals with regular income" is not. First, an "individual" in the vocabulary of the Code is a "real" person or human. Although it is nowhere defined precisely in that manner, a close reading of the definitions for "person" and "corporation" leads to that conclusion.[38]

An individual with a regular income is an "individual whose

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ganization, see *id.* §§ 1161-1174.

[31] For an explanation of chapter 13, see text accompanying note 36 *infra*.

[32] The Bankruptcy Act, ch. 541, § 77, 30 Stat. 544 (1898) (repealed 1978) (codified at 11 U.S.C. § 205 (1976) (amended 1978)), governed railroad bankruptcies. Such actions were referred to as chapter VIII cases. Section 77 of the Act contemplated reorganization of the railroad.

[33] 4 B.R. 226 (Bankr. Ct., D. Mass. 1980).

[34] *Id.* at 231.

[35] Judge Lavien pointed out that chapter 13 contains the broadest debtor relief proceeding and was undeniably intended for use in the consumer context. He further noted that Congress clearly intended chapter 11 as a business reorganization chapter. *Id.*

[36] 11 U.S.C. § 109(e) (Supp. III 1979).

[37] *See* note 29 and acompanying text *supra*.

[38] *See* 11 U.S.C. § 101(8) & (30) (Supp. III 1979) ("person" and "corporation" defined).

income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title [Title II] other than a stockbroker or a commodity broker."[39] This definition can be translated into a simple rule: If the bankruptcy court will accept the chapter 13 plan, the debtor has a "regular income."[40]

Chapter XIII of the Bankruptcy Act[41] limited similar proceedings to persons who were "wage earners." Those were individuals "whose principal income [was] derived from wages, salary or commissions."[42] The Code expands chapter 13 coverage by permitting self-employed individuals, such as proprietors or farmers, to file. Although they are not "wage earners," these individuals usually have the capacity to propose a plan.

Joint proceedings are permitted under chapter 13, but the debt limits—$100,000 unsecured and $350,000 secured—do not increase. Spouses filing jointly must show an aggregate debt within those limits.[43]

C. Electing a Remedy: Voluntary Proceedings

An attorney representing a petitioning debtor must elect a chapter under which to file.[44] Should conditions change, however, it is possible to move for conversion to another chapter.[45]

Electing to liquidate or reorganize a business other than a proprietorship—electing between chapters 7 and 11—is basically a business decision. That is, it is not really a question of law but rather a management decision. A debtor with any hope for future financial success should consider reorganization. Even where reorganization under chapter 11 seems unlikely, that chapter may still be desirable. Section 1123(b)(4) now permits

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[39] *Id.* § 101(24).

[40] Confirmation of chapter 13 plans is governed by *id.* § 1325.

[41] Bankruptcy Act, ch. 541, §§ 601-686, 30 Stat. 544 (1898) (repealed 1978) (codified at 11 U.S.C. §§ 1001-1086 (1976) (amended 1978)).

[42] Bankruptcy Act, ch. 541, § 606(8), 30 Stat. 544 (1898) (repealed 1978) (codified at 11 U.S.C. § 1006(8) (1976) (amended 1978)).

[43] 11 U.S.C. § 109(d) (Supp. III 1979).

[44] The petition must set forth the chapter elected. *See* INTERIM R. BANKR. P. 1002(a), Form No. 1.

[45] 11 U.S.C. §§ 706, 1112, 1307 (Supp. III 1979).

confirmation of a chapter 11 proceeding where liquidation is the object.[46] Thus, where liquidation of an ongoing, operating business is preferable—a "going out of business sale" would be a classic example—chapter 11 may be selected.

Reorganization of a business can take place under either chapter 11 or chapter 13, as long as the chapter 13 filing involves a sole *proprietorship* owing less than the $100,000 secured and $350,000 unsecured debt limits.[47] Where a client qualifies under either chapter, two differences are crucial. First, a trustee is always appointed in chapter 13 cases and will take charge of the debtor's affairs.[48] In chapter 11 cases, however, a trustee will not be appointed unless a party in interest can show cause or need for such appointment.[49]

In addition, the confirmation of a chapter 13 plan depends solely upon the bankruptcy court's exercise of discretion under section 1325.[50] Section 1325 requires that a plan meet five standards: (1) compliance with Code requirements;[51] (2) payment of filing fees due the court and such fees and other amounts which the plan requires be paid prior to confirmation;[52] (3) the plan must be proposed in good faith;[53] (4) the plan must be in the "best interests of creditors"; it must pay at least as much to unsecured creditors as a chapter 7 proceeding would pay;[54] and (5) secured creditors must either accept the plan or retain their liens and eventually receive the value of their secured claim or receive their collateral from the surrendering debtor.[55] It is important that only secured creditors have any possible "vote." Otherwise, the decision is the court's.

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[46] *Id.* § 1123(b)(4).

[47] *Id.* § 109(d); *see* text accompanying note 36 *supra.*

[48] 11 U.S.C. § 1302 (Supp. III 1979). *Id.* § 1302(b)(3) provides that: "The trustee shall . . . (3) advise [the debtor] other than on legal matters, and assist the debtor in performance under the plan . . . ." An impecunious client might well benefit from such advice, presuming the trustee has the available time and requisite expertise.

[49] *Id.* § 1104(a). Causes include "fraud, dishonesty, incompetence or gross mismanagement" and the need to protect equity security holders and creditors. *Id.*

[50] *Id.* § 1325(a).

[51] *Id.* § 1325(a)(1).

[52] *Id.* § 1325(a)(2).

[53] *Id.* § 1325(a)(3).

[54] *Id.* § 1325(a)(4).

[55] *Id.* § 1325(a)(5).

Compare this proceeding with confirmation under chapter 11 at section 1129.[56] Section 1129(a) lists ten tests, including the "best interests of creditors" test.[57] Further, unsecured creditors must vote on the plan.[58] This vote is not wholly binding, and the court may "cram down" a plan over the objection of creditors.[59]

Where the court attempts to impose a plan over the creditors' objection, an additional test must be met. The "fair and equitable test" of section 1129(b)(2)[60] requires that a "crammed down" plan include extensive provisions protecting secured and unsecured creditors. Secured creditors must be adequately protected under the "crammed down" plan. Three alternatives are available: (1) retention of the lien and payment, under the plan, to the secured creditor of the present value of his claim;[61] (2) sale of the property free of the lien with the lien attaching to proceeds;[62] or (3) receipt by the creditor of the "indubitable equivalent" of his claim.[63] The "crammed down" plan must pay all unsecured creditors in full[64] or on the basis of absolute priority.[65] If any class of unsecured claims is junior to another class, the senior class must be paid in full before the junior class receives anything.

Obviously, it will frequently be more difficult to secure approval for a chapter 11 plan than a chapter 13 plan. Election between the two chapters may be distilled to a single question: Does the absence of a trustee outweigh the difficulty of getting the plan confirmed?

Where the debtor is an individual, perhaps not even engaged in business, his attorney must still consider the alterna-

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[56] *Id.* § 1129(a).

[57] *Id.* § 1129(a)(7)(A)(ii).

[58] *Id.* § 1129(a)(7)(A)(i); *see id.* § 1126 (other provisions for acceptance of plan by creditors).

[59] *Id.* § 1129(b)(1).

[60] *Id.* § 1129(b)(2).

[61] *Id.* § 1129(b)(2)(A)(i).

[62] *Id.* § 1129(b)(2)(A)(ii).

[63] *Id.* § 1129(b)(2)(A)(iii). "Indubitable equivalent" is an ill-defined term derived from *In re* Murel Holding Corp., 75 F.2d 941, 942 (2d Cir. 1935). *See* 124 CONG. REC. S17,421 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).

[64] 11 U.S.C. § 1129(b)(2)(B)(i) (Supp. III 1979).

[65] *Id.* § 1129(b)(2)(B)(ii).

tives of a chapter 7 or a chapter 13 arrangement. Chapter 7 requires surrender of most property subject to a security interest as part of the liquidation. Chapter 13 enables a qualified debtor to retain such property and simultaneously to reduce a crushing load of unsecured debt.

A chapter 13 plan is acceptable if it is proposed in "good faith" and is in the best interest of creditors, that is, the plan proposes to pay unsecured creditors at least as much as such creditors would receive in a chapter 7 liquidation.[66] Many debtors who might qualify under chapter 13, however, have no assets that could be distributed in a chapter 7 case. Thus, the courts are currently wrestling with "good faith" as it may modify the "best interests" test. The issue is simple and reduces to the question whether a chapter 13 plan may propose to pay nothing (or a very small percentage) to unsecured creditors where the debtor has no assets available for distribution if liquidation were to occur. Several distinct views are emerging. Some courts find that no-payment or low-payment plans violate the "good faith" test. Other courts permit such plans as a matter of course.

Illustrative of cases (and courts) taking the first approach is *In re Iacovoni*,[67] in which the court held that the legislative history of the Code clearly shows that Congress contemplated that all chapter 13 plans would require some payment to unsecured creditors.[68] The court then determined that the "good faith" requirement of section 1325(a)(3), interpreted in light of the congressional intent and legislative history of chapter 13, required the court to deny confirmation of "no-payment" plans, even where the "best interest" test was not violated.[69] Other courts have made a practice of confirming low-payment or no-payment plans where the debtor has no funds available for distribution in chapter 7 and appears to have proposed the plan in what might be called "equitable good faith."[70]

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[66] *Id.* § 1325(A)(3)-(4).

[67] 2 B.R. 256 (Bankr. Ct., D. Utah 1980).

[68] *Id.* at 263-65.

[69] *Id.* at 265-68.

[70] *E.g.*, *In re* Dills, 7 B.R. 160, 164 (Bankr. Ct., E.D. Tenn. 1980) (one percent payment confirmed); *see In re* Heard, 6 B.R. 876, 886 (Bankr. Ct., W.D. Ky. 1980) (collecting "no payment" cases). Judge Barney E. Eaton, the Bankruptcy Judge for the South-

The Eighth Circuit took an entirely different approach in a case in which a couple filing jointly under chapter 13 could not afford to make any payments to unsecured creditors because the debtors had so little income that they could barely afford shelter, food, and clothing. The court reasoned that persons who could not afford to make payments to unsecured creditors in a chapter 13 proceeding were not persons "with a regular income" and thus were not eligible to file under chapter 13.[71]

A final approach has been suggested by Bankruptcy Judge Raphael of the Northern District of Mississippi. He notes that a discharge cannot occur under section 1328 unless a debt is "provided for by the plan."[72] If no payment is made, he suggests that it is possible that a debt has not been "provided for" and may not be discharged. Therefore, he strongly recommends that any plan under chapter 13 make an attempt to pay some amount to unsecured creditors.[73] This debate is likely to continue until further appellate decisions resolve the controversy. Thus, the debtor's attorney should investigate the status of "no-payment" plans in his district prior to electing chapter 13.[74]

For one class of debtors, chapter 13 is the only remedy available. If a debtor has been discharged in bankruptcy during the six years preceeding the filing of the instant petition, he is barred from all other chapters. If the debtor cannot file under chapter 13, he cannot file at all.[75]

D. Electing a Remedy in Involuntary Proceedings

Creditors filing involuntary petitions are permitted to select either chapter 7 or chapter 11.[76] No provision is made for an

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ern District of Mississippi, has confirmed "no payment" cases. Telephone interview with Judge Eaton (July 14, 1981).

[71] *In re* Terry, 630 F.2d 634, 634-36 (8th Cir. 1980).

[72] 11 U.S.C. § 1328(a) (Supp. III 1979).

[73] Interview with Bankruptcy Judge Eugene J. Raphael, Oxford, Mississippi (Nov. 13, 1980).

[74] *See In re* Heard, 6 B.R. 876, 885-86 (Bankr. Ct., W.D. Ky. 1980) (lists "no payment" cases).

[75] *See* 11 U.S.C. § 727(a)(1) (Supp. III 1979) (prohibits discharge in chapter 7); *id.* § 1141(d)(3) (prohibits discharge in chapter 11). There is no prohibition against such discharges in chapter 13 proceedings. *In re* Ciotta, 4 B.R. 253 (Bankr. Ct., E.D.N.Y. 1980).

[76] 11 U.S.C. § 303(a) (Supp. III 1979).

involuntary chapter 13[77] or an involuntary chapter 9 bankruptcy.[78] Creditors who believe that a debtor has a greater value as a "going concern" might desire to file for a chapter 11 reorganization.[79] Otherwise, the selection of chapter 7 is generally advisable, principally because chapter 7 filings require the appointment of a trustee.[80]

E. Changing Chapters in Midstream

1. Conversion

In a voluntary case, the debtor, having chosen to proceed under a particular chapter may once, as a matter of right, select another chapter without showing cause.[81] This election is most important where an involuntary chapter 7 debtor desires to convert the proceeding to one under either chapter 11 or chapter 13.[82] However, the debtor's right to conversion *from* chapter 11 is limited. He may not convert, as a matter of right: (1) an involuntary chapter 11; (2) a chapter 11 converted to that chapter for cause shown by another party; or (3) a chapter 11 in which the debtor has lost possession (*i.e.*, a chapter 11 in which a trustee has been appointed).[83]

After a debtor exercises his initial right to convert,[84] or where the debtor in a chapter 11 case finds himself without the right to convert, he, like any other party in interest, may move

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[77] Congress determined that a provision for involuntary chapter 13 proceedings would be: "bad policy, because chapter 13 only works when there is a willing debtor that wants to repay his creditors. Short of involuntary servitude, it is difficult to keep a debtor working for his creditors when he does not want to pay them back." H.R. REP., *supra* note 17, at 322.

[78] Congress noted that any provision for involuntary chapter 9 proceedings might violate the tenth amendment, being an unwarranted invasion of state sovereignty. Further, as a policy matter, Congress did not want, "the fate of a municipality, governed by officials elected by the people of the municipality, to be determined by a small number of creditors of the municipality." H.R. REP., *supra* note 17, at 321-22.

[79] 11 U.S.C. §§ 1101-1174 (Supp. III 1979).

[80] *See* text accompanying note 422 *infra*.

[81] Proceedings commenced under chapter 7 are governed by 11 U.S.C. § 706(a) (Supp. III 1979), while conversions under chapter 11 are governed by § 1112(a), and those under chapter 13 are governed by § 1307(a).

[82] *Id.* § 706(a).

[83] *Id.* § 1112(a)(1)-(3).

[84] *See* note 81 and accompanying text *supra*.

for conversion to another chapter for cause shown.[85] Of course, a converting debtor must always be qualified as a debtor under the new chapter.[86]

2. Conversion by Creditors and Other Parties in Interest

Creditors and other parties in interest may move for conversion even where the creditor initially selected the chapter in an involuntary case. Creditors must always show cause, however, and the right to request conversion is governed by rules which limit it substantially.[87]

All requests for conversion for cause shown require notice and hearing.[88] Any request for conversion from either chapter 7 or chapter 11 to chapter 13 will be denied unless the debtor consents.[89] Farmers or non-profit corporations which have filed voluntary chapter 11 proceedings must consent to conversion to chapter 7,[90] and a farmer who filed under chapter 13 must consent to conversion to chapter 7 or chapter 11.[91] Again, the debtor must be qualified as a debtor under the chapter to which conversion is sought.[92]

II. Who May or Should Be a Debtor

Just as those clients that are candidates for bankruptcy are not all candidates for simple liquidation, not every client with financial troubles is a potential candidate for bankruptcy. Certain clients may not be permitted to take advantage of the Bankruptcy Code's provisions, and certain situations may not require the draconian remedy of bankruptcy.

The questions which follow form at least one framework in which to resolve the decision whether to file a petition[93] in bank-

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[85] *See* 11 U.S.C. § 706(b)-(c) (Supp. III 1979) (chapter 7); *id.* § 1112(b)-(c) (chapter 11); *id.* § 1307(c) (chapter 13).

[86] *Id.* §§ 706(d), 1112(d), 1307(f).

[87] *Id.* §§ 706(b)-(c), 1112(b)-(c), 1307(c).

[88] *Id.* §§ 706(b)-(c), 1112(b)-(c), 1307(c).

[89] *Id.* §§ 706(c), 1112(d); *see* note 77 *supra* (unwilling debtor).

[90] 11 U.S.C. § 1112(c) (Supp. III 1979).

[91] *Id.* § 1307(e).

[92] *Id.* §§ 706(d), 1112(d), 1307(f).

[93] The initial pleading in bankruptcy is a "petition," rather than a "complaint." *See*

ruptcy for a particular client:

A. Can this client be a debtor under the Bankruptcy Code?
B. Can this qualifed debtor be discharged or discharge his debts in bankruptcy?
C. Can an involuntary bankruptcy be filed?
D. What benefits will bankruptcy provide?

Involuntary petitions, filed by creditors alleging the bankruptcy of a debtor, are governed by similar considerations, though the perspective is always that of the creditor.[94]

A. Can This Client be a Debtor Under the Bankruptcy Code?

Not every legal or natural person may seek the protection of the Bankruptcy Code; thus, attorneys frequently attempt to file bankruptcy petitions on behalf of clients that cannot qualify.[95] Attorneys for creditors seeking to file involuntary cases must take this analysis one step further. Not only must the debtor be qualified to file but the creditor or creditors must also be qualified to file.[96]

The first and most important test to be met by a prospective debtor in a voluntary bankruptcy is self evident: the debtor must be "insolvent." To be insolvent under the Code, a debtor's assets must be less than his liabilities. This balance sheet test is found in section 101(26).[97] Involuntary debtors need not be actu-

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id. § 301.

[94] *Id.* § 303.

[95] An analysis of chapter proceedings under the Bankruptcy Act filed during the period 1974-1978 in the District of Massachusetts revealed that significant numbers of cases were dismissed because the petitioners were not qualified to seek the protection of the Act. Most frequently dismissed were trusts. R. Ayers, Empirical Study of Chapter XI Proceedings in the District of Massachusetts 1974-78 (March 15, 1979) (unpublished thesis in Harvard Law School Library).

[96] *See* 11 U.S.C. § 303(b) (Supp. III 1979); notes 183 through 201 and accompanying text *infra*.

[97] The definition at 11 U.S.C. § 101(26) (Supp. III 1979) is:

(26) "insolvent" means—

(A) with reference to an entity other than a partnership, financial condition such that the sum of such entity's debts is greater than all of such entity's

ally insolvent. Section 101(h) permits the bankruptcy court to approve a controverted involuntary filing if the debtor is not paying his debts as they mature or if he has suffered an assignment or receivership of all or most of his property.[98]

Like the Bankruptcy Act,[99] the Code does not always expressly include or exclude various types of persons and entities,[100] but it does provide a starting point—section 109, which is appropriately entitled "Who may be a debtor."[101] Section 109 begins with a simple jurisdictional prerequisite. Any "person" seeking the status of a debtor in bankruptcy must either reside in the United States or must have "a domicile, place of business or property in the United States."[102]

The term "person" used in the jurisdictional statement and elsewhere in section 109 is defined at section 101(30)[103] to in-

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property, at a fair valuation, exclusive of—

(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and

(ii) property that may be exempted from property of the estate under section 522 of this title; and

(B) with reference to a partnership, financial condition such that the sum of such partnership's debts is greater than the aggregate of, at a fair valuation—

(i) all of such partnership's property, exclusive of property of the kind specified in subparagraph (A)(i) of this paragraph; and

(ii) the sum of the excess of the value of each general partner's separate property, exclusive of property of the kind specified in subparagraph (A)(ii) of this paragraph, over such partner's separate debts

. . . .

The basic definition at § 101(26)(A) involves a little more than a simple balance sheet analysis, since calculation of asset value is based upon a somewhat ambiguous term—"fair valuation"—which is not defined, but rather is adopted from the equally ambiguous standards of the Bankruptcy Act, ch. 541, § 1(19), 30 Stat. 544 (1898) (repealed 1978) (codified at 11 U.S.C. § 1(19) (1976) (amended 1978)). For an extensive discussion, see 2 W. COLLIER, BANKRUPTCY ¶ 101.26(4) (15th ed. 1981).

[98] 11 U.S.C. § 303(h) (Supp. III 1979). These standards are at issue only when the petition is controverted. With the exception of the two tests mentioned, the Code does away with the old "acts of bankruptcy" analysis of the Bankruptcy Act, ch. 541, § 3(a), 30 Stat. 544 (1898) (repealed 1978) (codified at 11 U.S.C. § 21(a) (1976) (amended 1978)). For a discussion, see 2 W. COLLIER, *supra* note 97, ¶ 303.11.

[99] Bankruptcy Act, ch. 541, 30 Stat. 544 (1898) (repealed 1978).

[100] *See* notes 102 through 109 and accompanying text *infra*.

[101] 11 U.S.C. § 109 (Supp. III 1979).

[102] *Id.* § 109(a).

[103] *Id.* § 101(30).

clude individuals, partnerships, and corporations, but not governmental units. Excluded by implication are estates and trusts, which are referred to by the generic term "entity."[104]

In order to determine whether less typical business organizations qualify for protection, it may still be necessary to search the Code, its legislative history, and the case law now emerging. Business trusts are a fairly common form of business organization, as are associations, joint-stock companies, and partnership associations. The Code expressly provides that these entities are included in the term "corporation."[105] Although the Code is not specific, its legislative history makes it clear that the term "unincorporated association," included in the definition of "corporation," encompasses labor unions.[106]

Although certain governmental units may be incorporated (*e.g.*, municipalities), the term "person," of which the term "corporation" is but a subdivision, expressly excludes "governmental units."[107] The Code does, however, provide for the bankruptcies of "municipalities" in chapter 9.[108] Section 109(c) defines the entities that may seek relief under the provisions of that chapter.[109]

Within this group of business organizations, the trust seems to cause the most difficulty. The bankruptcy attorney must distinguish between the business trust, an entity qualifying for treatment as a corporate "person," and the beneficial trust which happens to be engaged in some commercial activity. The ordinary beneficial trust is not a "person" and is thus not eligible for the protection of the Code. Distinguishing business trusts from beneficial trusts posed problems under the Bankruptcy Act,[110] and several courts have already wrestled with the issue

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[104] *Id.* § 101(14).

[105] *Id.* § 101(8).

[106] H.R. REP., *supra* note 18, at 309; S. REP. No. 95-989, 95th Cong., 2d Sess. 22 (1978).

[107] 11 U.S.C. § 101(30) (Supp. III 1979); *see* H.R. REP., *supra* note 17, at 313; S. REP., *supra* note 106, at 25.

[108] 11 U.S.C. §§ 901-946 (Supp. III 1979).

[109] *Id.* § 109(c).

[110] *See, e.g.*, Associated Cemetery Management, Inc. v. Barnes, 268 F.2d 97, 101-02 (8th Cir. 1959) (private trust not covered). Under § 1(8) of the Bankruptcy Act, ch. 541, 30 Stat. 544 (1898) (repealed 1978) (codified at 11 U.S.C. § 1(8) (1976) (amended 1978)),

under the Bankruptcy Code.

The first reported case raising the question was filed less than two months after the Code went into effect. On November 28, 1979, the Bankruptcy Court for the Middle District of Florida received the voluntary chapter 11 petition of Treasure Island Land Trust; the debtor's right to file was challenged by secured creditors within two days.[111] Analyzing the sections reviewed above, together with prior statutory and case law, the court ruled that the trust involved was not a "business trust,"[112] but rather a "non-business trust."[113] The court reasoned that a "business trust," like a corporation, is organized to carry on a business or a "commercial activity for profit," while a "non-business trust" is formed primarily to preserve a *res*.[114] The implication is that although a business trust, like a corporation, takes risks in hopes of profit, a non-business trust is not permitted to take such risks.

Treasure Island Land Trust, however, had obviously been set up to purchase and hold real estate for speculation, which is the sort of thing business trusts are frequently created to do. "Beneficial interests" were bought and sold like corporate shares and were held by a large number of participants.[115] On the surface, this trust looked and operated like a corporation. On the other hand, Treasure Island Land Trust was not organized under any state "business trust" statute; it had not registered with the State of Florida as a business trust; the original trust agreement did not permit the trustee to engage in business activities; and the trustee had previously petitioned for permission to collect assessments in order to "preserve and protect assets and properties."[116] The court stated that these and other facts were sufficient to justify a finding that this entity was a "non-

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only business trusts "wherein beneficial interest or ownership is evidenced by certificate or other written instrument" could file in bankruptcy.

[111] *In re* Treasure Island Land Trust, 2 B.R. 332, 333 (Bankr. Ct., M.D. Fla. 1980).

[112] *Id.* at 336.

[113] *Id.* at 334.

[114] *Id.*

[115] *Id.* Note that this would have fit the description used under the Bankruptcy Act. *See* note 110 *supra*.

[116] *In re* Treasure Island Land Trust, 2 B.R. 332, 334-36 (Bankr. Ct., M.D. Fla. 1980).

business" trust and, as such, not permitted to seek the protection of the Bankruptcy Code.[117]

More recently, the Southern District of Florida addressed the same issue in *In re Norman Cohen, Trustee.*[118] In an extensive opinion that frequently cited *In re Treasure Island Trust,* Bankruptcy Judge Weaver ruled:

> The debtor is stuck with the characteristics of the entity he has chosen. He cannot have it all ways in his favor. The debtor chose the form of entity which would provide for him the most favorable tax treatment and the most convenient method of operation. Having enjoyed the benefits of the trust form of existence, the "trustee" cannot now ignore the detriments—this land trust is simply not entitled to protection under the Bankruptcy Code.[119]

Judge Weaver analyzed the trust agreement, activities of the trust and its trustee, Florida statutory law, case law under the Bankruptcy Act, and the legislative history of the Code. Like the court in *In re Treasure Island Trust,* he was particularly persuaded by the fact that, other than purchasing land for resale at a profit, the trust never did anything that looked like "business."[120]

Bankruptcy Judge Harold Lavien of the District of Massachusetts perceived the issue somewhat differently in *In re Ponn Realty Trust*:[121]

> The court concurs with the debtor that, under the proper circumstances, a business trust such as a realty trust with transferrable shares may be a proper debtor under chapter 11 of the Bankruptcy Code. The issue presented herein, however, is broader than the issue addressed in the debtor's arguments. In the present case, the sole asset of the debtor trust is a one-family residence occupied by the trustee and her family. The real issue presented is whether chapter 11 is an appropriate vehicle for the adjustment of mortgage indebtedness on a sin-

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[117] *Id.* at 336.
[118] 4 B.R. 201 (Bankr. Ct., S.D. Fla. 1980).
[119] *Id.* at 209.
[120] *Id.* at 206-07.
[121] 4 B.R. 226 (Bankr. Ct., D. Mass. 1980).

gle-family residence.[122]

Judge Lavien reviewed the legislative history of chapter 11 and concluded that it left "no doubt that chapter 11 . . . was intended for utilization solely in a business setting and not in a consumer context."[123]

Section 109 also denies certain corporate persons, duly chartered by governmental authority, the right to proceed in bankruptcy. Section 109(b) provides that domestic insurance companies, banks, and thrift institutions are not permitted to seek liquidation under chapter 7 of the Code, nor are foreign insurance, banking, or thrift institutions which do business in this country.[124] These corporate persons are also excluded from the other chapters of the Code by the remaining subsections of section 109.[125]

These corporations are regulated by state and federal agencies, which are usually the same agencies which grant charters to new banks, savings and loans, or insurance companies. State chartered insurance and thrift institutions in financial difficulty are generally dealt with under state statutory provisions for receiverships.[126] Nationally chartered thrift institutions are governed by federal statutes permitting involuntary receiverships, and the requisite proceedings are generally initiated by the Comptroller of the Currency.[127]

These, then, are the clients for whom voluntary proceedings in bankruptcy may never be filed. But not all bankruptcies are

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[122] *Id.* at 229.

[123] *Id.* at 231.

[124] 11 U.S.C. § 109(b) (Supp. III 1979).

[125] *Id.* §§ 109(c)-(e).

[126] *E.g.*, MISS. CODE ANN. §§ 81-9-1 to -73 (1972) (banks); *id.* §§ 81-12-181 to -185 (Supp. 1980) (savings associations); *id.* §§ 83-6-31 to -43 (Supp. 1980) (insurance companies).

This exclusion from the Bankruptcy Code is no trivial matter. The failure of Bankers Trust Company and its subsidiary, Bankers Trust Savings & Loan, with deposits of $200,000,000, had a dramatic impact in Mississippi. *See* Bankers Trust Co. v. Travis (*In re* Bankers Trust Co.), 566 F.2d 1281, 1283 (5th Cir. 1978) (collapse of Bankers Trust); *accord, In re* Equity Funding Corp., 396 F. Supp. 1266, 1268 (C.D. Cal. 1975) (insurance company collapse).

[127] *See* 12 U.S.C. §§ 191-200 (1976) (national banks); *id.* § 1464(d) (Supp. III 1979) (nationally chartered savings associations).

voluntary, and, where an involuntary petition is contemplated under section 303,[128] it is important to remember that the petition may not name a farmer[129] or a non-profit corporation[130] as a debtor.

B. Debtors and Debts Dischargeable in Bankruptcy

Other clients that appear qualified to file for relief in bankruptcy may not be able to secure discharge of their debts. Discharge of one's debts and the fresh start made possible by such discharge is the goal and purpose of bankruptcy,[131] and if that remedy is not available the proceeding has accomplished little other than to delay the inevitable onslaught of creditors and other claimants.[132]

The discharge issue can arise in two contexts. First, certain debtors are not permitted to be discharged. Second, certain debts are non-dischargeable and continue to be enforceable even after successful completion of a bankruptcy proceeding.

1. Persons Who Cannot Be Discharged

Individual debtors who are not dischargeable are usually debtors who have been granted discharges in actions under the Code or the Bankruptcy Act at any time during the six years preceeding the new petition.[133] Section 727(a)(8)[134] prohibits

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[128] 11 U.S.C. § 303 (Supp. III 1979).

[129] *Id.* § 303(a); *see* notes 186 through 190 and accompanying text *infra.*

[130] 11 U.S.C. § 303(a) (Supp. III 1979). A wag might suggest that any bankrupt corporation is "non-profit."

[131] Williams v. USF&G, 236 U.S. 549, 554-55 (1915); Board of Equalization v. Coast Radio Prod., 228 F.2d 520, 523 (9th Cir. 1955). This statement does not apply to debtors who are not individuals, since corporate and other entities cannot be "discharged" in chapter 7 liquidations. *See* note 124 and accompanying text *supra.* Corporations, however, frequently seek partial discharges under chapter 11 reorganization proceedings. *See* 11 U.S.C. § 1141(d)(1) (Supp. III 1979) (discharge upon confirmation).

[132] Nothing in the Code prohibits such debtors from filing petitions, so the use of Code filings to delay creditors is certainly possible. Because of the six year previous discharge rule, however, such petitions rarely bring discharge. *See generally* 4 W. COLLIER, *supra* note 97, ¶ 727.11[1] (six year previous discharge).

[133] 11 U.S.C. § 727(a)(8) (Supp. III 1979). This information must be disclosed by the debtor in the "Statement of Financial Affairs" that must be filed by all debtors. *See* 11 U.S.C.A. app., Form 7, question 7, Form 8, question 9 (1976).

Objections to discharge generally take the form of adversary proceedings filed by

granting discharges to chapter 7 (liquidation)[135] debtors who have been discharged in any proceeding under the Bankruptcy Act or in any proceeding under the Code unless that debtor is eligible for treatment under section 727(a)(9).[136] Subsection (a)(9) preserves a narrow exception by permitting a chapter 7 discharge for a debtor who has been granted a discharge under chapter 13 of the Code or Chapter XIII of the Bankruptcy Act.[137] The section 727(a)(9) discharge is permitted for new filings within six years by such debtors if the earlier chapter 13 (or XIII) proceeding culminated in the payment of "(A) 100 percent of the allowed unsecured claims . . .; or (B)(i) 70 percent of such claims; and (ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort . . . ."[138]

Individual debtors who file chapter 11 proceedings may also be denied discharge under the provisions of section 1141(d)(3),[139] which provides that a debtor who (1) proposes a plan calling for the liquidation of all or most of his estate,[140] and (2) who does not "engage in business after consummation of the plan" will be denied a discharge if he would be denied a discharge under chapter 7. Thus, an individual debtor (as compared to a corporate debtor) cannot use chapter 11's liberalized liquidating plan provision to do under chapter 11 what he could not do under chapter 7—liquidate and get a discharge within six years.

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objecting creditors. Where such objections are not filed, case law under the prior Act holds that discharge may occur, irrespective of prior bankruptcies. Matawan Bank v. Feldman, 12 N.J. Misc. 785, 174 A. 442, 443-44 (1934). Of course, the court could always take judicial notice of a prior discharge under the Act. *In re* Hammond, 9 F. Supp. 628, 629 (D. Kan. 1934).

Notwithstanding the old case law, the Code seems to clearly prohibit the grant of a discharge, even though no objection is raised, since it states that a discharge shall be granted *unless* "the debtor has been granted a discharge under this section." 11 U.S.C. § 727(a)(Supp. III 1979).

[134] 11 U.S.C. § 727(a)(8) (Supp. III 1979).

[135] *Id.* §§ 701-766.

[136] *Id.* § 727(a)(9).

[137] Bankruptcy Act, ch. 541, §§ 601-602, 30 Stat. 544 (1898) (repealed 1978) (codified at 11 U.S.C. §§ 1001-1086 (1976) (amended 1978)).

[138] 11 U.S.C. § 727(a)(9) (Supp. III 1979).

[139] *Id.* § 1141(d)(3).

[140] *See id.* § 1123(b)(4) (liquidation provisions); note 46 and accompanying text *supra.*

An individual filing under chapter 11 who does not propose a liquidating plan could be discharged even though he had received a chapter 7 discharge within the preceeding six years. Neither would the debtor discharged under the Bankruptcy Act or chapters 11 and 13 of the Code be barred from discharge under this section. How large this loophole might be is debatable. As discussed above,[141] chapter 11 plans are difficult to confirm. A debtor abusing the bankruptcy process by seeking frequent discharges under various chapters would surely fail to meet the severe tests for confirmation under chapter 11. Further, the court's discretionary power to deny confirmation of a plan not proposed in "good faith"[142] could be exercised to prevent a miscarriage of justice.

All chapter 13 proceedings are exempt from the six-year rule. Chapter 13 contains no prohibition against discharge for those individuals who have been discharged previously in bankruptcy under any provision of the Bankruptcy Code or Act.[143] Again, this is not a large loophole. Only a limited group of individuals can utilize chapter 13.[144] Further, a filing under chapter 13 following shortly upon the heels of another bankruptcy proceeding could be an abuse of the Code's discharge provisions. If such an abuse is shown, the court has the discretionary power to deny relief to the debtor.[145]

Other debtors, even though not involved in bankruptcy proceedings during the preceding six years, may still be denied dis-

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[141] *See* notes 56 through 65 and accompanying text *supra*.

[142] 11 U.S.C. § 1129(a)(3) (Supp. III 1979).

[143] Analysis of the Code reveals no prohibition against chapter 13 proceedings filed within the six year period following any prior proceeding under any chapter of the Code or Act. *In re* Ciotta, 4 B.R. 253, 255 (Bankr. Ct., E.D.N.Y. 1980).

[144] *See* notes 36 through 43 and accompanying text *supra*.

[145] Although chapter 13 plans may result in discharge, they cannot be confirmed by the court unless the plan is proposed in "good faith." 11 U.S.C. § 1325(a)(3) (Supp. III 1979).

Also, a chapter 13 plan may not be confirmed unless, under its provisions, an unsecured creditor receives at least what he would in a chapter 7 liquidation. Unsecured creditors of a person filing a chapter 7 proceeding, where the person has been a debtor in bankruptcy within the six years prior to filing, are protected by § 727(a)(8)-(9). Therefore, creditors of a chapter 13 debtor must receive similar protection. Cases employing analogous reasoning are *In re* Marlow, 3 B.R. 305 (Bankr. Ct., N.D. Ill. 1980) and *In re* Cole, 3 B.R. 346 (Bankr. Ct., S.D.W. Va. 1980).

charge. Chapter 7 debtors may be denied discharges for various types of fraudulent conduct,[146] as well as for refusing to cooperate with the court.[147] Although it may not be possible to learn about the latter problem in advance, a client whose pre-bankruptcy conduct has been notoriously fraudulent may run afoul of the former. Here, also, chapter 11 incorporates the same limitations on dischargeability used in chapter 7 where a liquidating plan is proposed.[148]

Chapter 13 is, again, different and does not incorporate similar standards. Nevertheless, any pre-bankruptcy fraud (or failure to cooperate with the court) would justify either a dismissal by the court for unreasonable delay[149] or a refusal to confirm the plan[150] for lack of good faith by the debtor.[151]

2. Debts Which Cannot Be Discharged

A debtor qualified to file in bankruptcy and seek discharge will benefit from the proceeding only to the extent that his debts are dischargeable. Debts that are non-dischargeable are described in section 523(a),[152] and include:

(1) Certain taxes and customs duties;[153]

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[146] *See* 11 U.S.C. § 727(a)(2)-(4) (Supp. III 1979) (fraudulent actions denying discharge).

[147] *See id.* § 727(a)(6)-(7) (cooperation required on penalty of denial of discharge).

[148] *Id.* § 1141(d)(3); *see* text accompanying note 139 *supra.*

[149] 11 U.S.C. § 1328(e) (Supp. III 1979).

[150] *Id.* § 1307(c)(1).

[151] *Id.* § 1325(a)(3).

[152] *Id.* § 523(a).

[153] 11 U.S.C. § 523(a)(1) (Supp. III 1979) prohibits discharge of debts due:

> (1) for a tax or a customs duty—
>
> (A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(6) of this title, whether or not a claim for such tax was filed or allowed;
>
> (B) with respect to which a return, if required—
>
> (i) was not filed; or
>
> (ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or
>
> (C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax . . . .

Subsection (1)(A) clearly makes nondischargeable even those tax claims having a priority as administrative expenses under § 507(a). Also, even though a taxing authority

(2) debts which result from loans, obtained by false pretenses, actual fraud, or the use of falsified financial statements relied upon by creditors;[154]
(3) debts which the debtor fails to schedule;[155]
(4) debts created by the fraud of a debtor acting as a fiduiciary, or by embezzlement or larceny;[156]

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claim is a secured claim, it is not dischargeable. *See* H.R. REP., *supra* note 17, at 363 (discussion of § 523); S. REP., *supra* note 106, at 77 (same).

[154] 11 U.S.C. § 523(a)(2) (Supp. III 1979) prohibits discharge of debts:

> (2) for obtaining money, property, services, or an extension, renewal, or refinance of credit, by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; or
>
> (B) use of a statement in writing—
>
> (i) that is materially false;
>
> (ii) respecting the debtor's or an insider's financial condition;
>
> (iii) on which the creditor to whom the debtor is liable for obtaining such money, property, services, or credit reasonably relied; and
>
> (iv) that the debtor caused to be made or published with intent to deceive . . . .

Subparagraph (A) must be clearly distinguished from subparagraph (B). Under (A), proof of actual fraud, not constructive fraud, is required. Under (A), a false financial statement, which was only constructively fraudulent, would not prevent discharge. Under (B), the constructively fraudulent financial statement prevents discharge only if there is both reliance and intent to deceive. *See* 124 CONG. REC. H11,095-96 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards) (discussion of § 523(a)(2)); *id.* S17,412-13 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini) (same).

[155] 11 U.S.C. § 523(a)(3) (Supp. III 1979), prevents discharge of debts:

> (3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed; in time to permit—
>
> (A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or
>
> (B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request.

Failure to schedule will not prevent discharge where the creditor with knowledge of the proceeding sleeps on his rights.

[156] 11 U.S.C. § 523(a)(4) (Supp. III 1979) clarifies prior law, forbidding discharges where the debt is "for fraud or defalcation while acting in a fiduciary capacity, embezzle-

(5) debts owed to spouses, former spouses, and children for alimony, maintenance or support;[157]
(6) debts arising from intentional torts;[158]
(7) fines or penalties levied by governmental units;[159]
(8) student loans owed to governmental agencies or nonprofit institutions of higher education;[160] and
(9) certain debts not discharged in prior bankruptcies.[161]

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ment, or larceny."

[157] 11 U.S.C. § 523(a)(5) (Supp. III 1979) prevents discharge of debts due:

> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or property settlement agreement, but not to the extent that—
>
> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise; or
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support . . . .

[158] 11 U.S.C. § 523(a)(6) (Supp. III 1979) prevents the discharge of tort-related debts where such are "for willful and malicious injury by the debtor to another entity or to the property of another entity."

[159] 11 U.S.C. § 523(a)(7) (Supp. III 1979) states that certain government claims are not dischargeable:

> (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—
>
> (A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or
>
> (B) imposed with respect to a transaction or event that occurred before *three years* before the date of the filing of the petition . . . .

(emphasis added).

[160] 11 U.S.C. § 523(a)(8) (Supp. III 1979) continues the policy of prohibiting the discharge of loans made to students that are to be repaid:

> (8) [to] a governmental unit or a nonprofit institution of higher education, unless—
>
> (A) such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or
>
> (B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents . . . .

The limitations period, five years, is important, as is the hardship discharge permitted by subsection (B).

[161] 11 U.S.C. § 523(a)(9) (Supp. III 1979) prohibits discharge of a debt:

> (9) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section

While these nine types of debts are clearly not dischargeable in proceedings under chapters 7 and 11, in chapter 13 proceedings all but one may be dischargeable.

Section 523(a) begins by stating that "[a] discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual from" debts described in the body of the section.[162] This might appear to make debts not dischargeable in chapter 7 also not dischargeable in chapters 11 and 13. However, section 1328(b) applies only where the court decides to grant a discharge in a chapter 13 case in which the plan has not been completed successfully.[163] If a chapter 13 plan is completed, the discharge is granted under section 1328(a)(2), which permits discharge of all debts described in section 523(a) except claims for alimony, maintenance, or support.[164]

This oddity apparently is the result of a misprint or mistake. There is pending in Congress a bill to correct technical and typographical errors,[165] and that bill will change section 1328(a) so that all debts described at section 523(a) are deemed nondischargeable in chapter 13 cases.[166]

In the interim, courts will have to deal with this anomaly. A court might choose to accept section 1328(a)(2) on its face, reasoning that Congress did intend that "[an] embezzler, a thief, or a person convicted of voluntary manslaughter with a wrongful death judgment against him, may erase liability for such conduct by completion of a nominal chapter 13 plan."[167] Such reasoning

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727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act.

These are debts that could have been discharged in a prior proceeding but were not because the debtor waived discharge, failed to list the debt, or was denied discharge for fraud or similar conduct. S. REP., *supra* note 106, at 79.

[162] 11 U.S.C. § 523(a) (Supp. III 1979).

[163] *Id.* § 1328(b). This provision permits the court to grant a discharge to a chapter 13 debtor who is unable to complete a plan (1) if the "failure to complete . . . is due to circumstances for which the debtor should not justly be held accountable;" and (2) if the debtor has paid as much as would have been distributed under a chapter 7 proceeding. *Id.* § 1328(b)(1)-(2).

[164] *Id.* § 1328(a)(2).

[165] S. 863, 97th Cong., 1st Sess. (1981).

[166] *Id.* § 130.

[167] *In re* Marlow, 3 B.R. 305, 308 (Bankr. Ct., N.D. Ill. 1980). Apparently the author of the opinion, Judge DeGunther, has seen an opinion in which this sentiment was

ignores the existence of the changes proposed in the technical amendments bill.

Two technical arguments have been advanced for limiting the impact of section 1328(a)(2). The first argument begins with section 1325(a)(4), which prohibits confirmation of a chapter 13 plan which would distribute less to creditors than they would receive if the case were a chapter 7 liquidation.[168] This test is frequently called the "best interests of creditors" test. Since the comparable chapter 7 liquidation could not affect a non-dischargeable claim listed in section 523(a),[169] to permit discharge under chapter 13 of such claims obviously would not be in the "best interests of creditors." Therefore, a chapter 13 plan proposing to discharge non-dischargeable debts should not be confirmed. Bankruptcy Judge Pusateri of Kansas has accepted this argument in *In re McMinn*.[170]

The argument was rejected by Judge DeGunther of the Northern District of Illinois in *In re Marlow*[171] and by Judge Flowers of the Southern District of West Virginia in *In re Cole*.[172] Both judges held that the "best interests of creditors" test did not refer to what was to be "received" by a creditor in the chapter 13 proceeding, as compared with what would be "received" in a chapter 7 liquidation.[173] Rather, the language in section 1325(a)(4) required analysis of what a creditor "would be paid" in the two situations.[174] To quote Judge Flowers: "It is difficult to construe the continuing right to pursue the debtor as something 'paid' in chapter 7 liquidation."[175] Nevertheless, both courts rejected chapter 13 plans proposing to discharge debts not dischargeable under section 523(a).[176] Such plans were held to violate the "good faith" requirement of section 1323(a).[177]

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expressed.

[168] 11 U.S.C. § 1325(a)(4) (Supp. III 1979).

[169] *Id.* § 523(a).

[170] 4 B.R. 150, 153 (Bankr. Ct., D. Kan. 1980).

[171] 3 B.R. 305 (Bankr. Ct., N.D. Ill. 1980).

[172] 3 B.R. 346 (Bankr. Ct., S.D.W. Va. 1980).

[173] Marlow, 3 B.R. at 308; Cole, 3 B.R. at 350.

[174] Marlow, 3 B.R. at 308; Cole, 3 B.R. at 350.

[175] Cole, 3 B.R. at 350.

[176] Marlow, 3 B.R. at 308-09; Cole, 3 B.R. at 351.

[177] 11 U.S.C. § 1325(a)(3) (Supp. III 1979).

Judge Flowers found the plan in *Cole* to be "subjectively" lacking in good faith where the debtor's only significant debt was owed to a man the debtor had assaulted.[178] In *Marlow*, Judge DeGunther ruled that where the debtor proposed to distribute only one percent to unsecured creditors, and where certain debts were allegedly non-dischargeable, the "good faith" requirement had not been met,[179] and Judge Pusateri, in *McMinn*, relied upon a similar "good faith" analysis.[180]

Judge Eaton of the Southern District of Mississippi has expressly rejected this "good faith" argument, however, stating that "[t]he argument that the plan is not filed in good faith is warrantless, for the debtors are merely taking advantage of a law which Congress enacted."[181] On the other hand, Judge Eaton has not rejected the "best interest of creditors" test: "Further, the Court finds that the unsecured creditors would be paid nothing on their claims if the debtors in the above-styled cases were liquidated. Therefore, it is concluded that the plans filed, by the debtors herein, . . . meet all of the . . . requirements of sections . . . 1328 and 1325 . . . ."[182]

The courts that have denied discharges in chapter 13 on otherwise non-dischargeable debts have arguably reached the correct result. Certainly, debts non-dischargeable in chapters 7 or 11 should not be dischargeable in chapter 13. Congressional intent—in the form of a technical amendments bill—is clear, just as the equities involved are clear. Nevertheless, the present statutory language exists and clearly permits such discharge. The practitioner must be aware of this issue and its ramifications, whether he represents creditors affected by the problem or debtors seeking to take advantage of it.

C. Involuntary Bankruptcy

A debtor facing serious financial problems will often refuse to face reality. In appropriate cases, such a debtor's creditors

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[178] Cole, 3 B.R. at 351.
[179] Marlow, 3 B.R. at 308-09.
[180] McMinn, 4 B.R. at 152-53.
[181] *In re* Eichelberger, 6 B.R. 705, 708 (Bankr. Ct., S.D. Miss. 1980).
[182] *Id.*

may eventually tire of traditional attempts to collect their debts and decide to file an involuntary petition under section 303 of the Code.[183] An attorney representing such creditors must first determine whether the debtor can be an involuntary bankrupt. Then, the attorney must determine whether his clients (or client, in the appropriate case) can file an involuntary petition.

1. Debtors Who May Not Be Involuntary Bankrupts

There are three classes of debtors that may not be adjudicated involuntary bankrupts. Section 303(a) permits filing only against a "person."[184] Since "person" is defined to include any "individual, partnership and corporation" but not any governmental unit, proceedings against governmental units are excluded.[185] Section 303(a) also expressly excludes from its scope farmers and corporations that are not "moneyed, business, or commercial corporation[s]" (*i.e.*, nonprofit corporate entities).[186]

The Bankruptcy Code does not exclude "wage earners" from its involuntary provisions, as did the Bankruptcy Act.[187] A farmer, as the term is used in this section, means "a person [receiving] more than 80 percent of such person's gross income during the taxable year preceding . . . [the petition] from a farming operation owned or operated by such person."[188] A "farming operation" is also defined to exclude manufacturing and processing of agricultural products.[189] Nothing in section 303 or the definitions limits the application of the term "farmer" to natural persons (*i.e.*, "individuals" in Code terminology).[190] Therefore, any "person" engaged in farming, whether a partnership, corporation, or individual, is free from the threat of an involuntary petition.

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[183] 11 U.S.C. § 303 (Supp. III 1979).

[184] *Id.* § 303(a).

[185] *Id.* § 101(30). For a discussion of this section's effect on involuntary municipal bankruptcies, see note 78 *supra*.

[188] 11 U.S.C. § 303(a) (Supp. III 1979).

[187] *Id.* § 22(b) (1976) (current version at 11 U.S.C. § 303(a) (Supp. III 1979)).

[188] *Id.* § 101(17) (Supp. III 1979).

[189] *Id.* § 101(18).

[190] *Id.* § 101(30).

2. Creditors Permitted to Initiate Involuntary Petitions

Creditors who are permitted to commence involuntary proceedings are described in section 303(b).[191] Such creditors must hold claims that are not contingent and that are unsecured. Three or more creditors with claims aggregating at least $5,000 may file an involuntary petition. If there are twelve or fewer non-contingent, unsecured creditors, then any one creditor with a claim for $5,000 or more may file the petition.[192] These requirements are not jurisdictional and are waived if the debtor does not controvert the involuntary petition.[193]

If the debtor is a partnership special rules apply, although the numerical requirements apply where the involuntary petition is initiated by general creditors. If the petition is filed by only one of the general partners, however, that is sufficient,[194] irrespective of agreements or state law to the contrary.[195] Also, where the involuntary debtor is a partnership, and an "order for relief"[196] has been entered as to all its general partners, any general partner, any trustee of a general partner, or any holder of a claim against the partnership may file an involuntary petition against the partnership.[197]

Where the debtor is a foreign entity involved in foreign proceedings similar to bankruptcy, a representative of the foreign estate may file an involuntary proceeding in order to administer assets in this country.[198]

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[191] *Id.* § 303(b)(1)-(4).

[192] *Id.* § 303(b)(1)-(2). Determination of whether a debt is secured or unsecured is controlled by § 506.

[193] Section 303(b) should be interpreted as overruling Commercial Credit Corp. v. Skutt, 341 F.2d 177 (8th Cir. 1965), and similar cases in which the trustee was permitted to challenge an involuntary petition on the basis of the number of creditors or amount of debt involved.

[194] 11 U.S.C. § 303(b)(3)(A) (Supp. III 1979).

[195] 124 CONG. REC. H11,091 (daily ed. Sept. 28, 1978).

[196] The Code substitutes "order for relief" for "adjudication." An "order for relief" is defined at 11 U.S.C. § 102(6) (Supp. III 1979). *Id.* § 301 states that "commencement of a voluntary case under . . . this title constitutes an order for relief," making the order equivalent to adjudication under the Bankruptcy Act. Compare *id.* § 1(12) (1976) (defining "date of adjudication") (repealed 1978).

[197] *Id.* § 303(b)(3)(B) (Supp. III 1979).

[198] *Id.* § 303(b)(4). Of course, the foreign entity against whom the petition is filed must be qualified under § 109(a)-(b). *See* note 102 *supra*.

Where only one creditor files an involuntary petition, the determination whether a debtor has twelve or fewer creditors becomes important. Creditors whose claims may be avoided under one of the sections of the Code are not counted, nor are employees of the debtor. Further, "insiders" are not counted.[199] "Insiders" are relatives of individual debtors or relatives of general partners of partnership debtors, partners and partnerships of the debtor, and corporate entities of which the individual debtor is either a director, officer, or controlling person.[200] Where the debtor is a corporation, directors, officers, or controlling persons and relatives of all such persons are insiders.[201]

3. Summary

In sum, these are the clients for whom bankruptcy is not available: Debtors who are not residents of or not doing business in the United States, trusts, estates, governmental units other than municipalities, and domestic and foreign banks, thrift institutions, and insurance companies doing business in the United States. Other debtors unable to secure discharges in bankruptcy are persons who have been discharged under chapters 7, 11, or 13, or in proceedings under the Bankruptcy Act. Two exceptions are important and must be kept in mind. Any individual discharged under any provision can file again within six years under chapters 11 and 13, if he otherwise qualifies for the protection of those chapters. Also, any individual who pays seventy percent of his debts in a good faith attempt to complete a chapter 13 plan, or any person who completes a chapter 13 plan under which his creditors are paid one hundred percent may file a chapter 7 or 11 proceeding at any time thereafter. Finally, although the debtor may be dischargeable, his debts may survive bankruptcy. Those debts are listed and described in section 523(a).

Creditors who may file involuntary bankruptcy petitions are limited to those who, either individually or in groups of three or more, can assert unsecured, noncontingent claims of $5,000 or

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[199] 11 U.S.C. § 303(b)(2) (Supp. III 1979).
[200] *Id.* § 101(25).
[201] *Id.*

more against debtors who are not farmers or nonprofit corporations. One creditor cannot act alone unless the debtor involved has twelve or fewer creditors.

After determining that a bankruptcy petition can be filed, or that a bankruptcy petition filed for an otherwise qualified debtor will discharge that debtor and his debts, the attorney must next consider exactly what benefits, if any, the petition will provide.

D. Benefits Provided by Bankruptcy

Congress, acting under the exclusive grant of authority found in the Constitution,[202] has created a bankruptcy system which proposes "either to rehabilitate a financially distressed debtor or to assemble and liquidate his assets for distribution to creditors."[203] Whatever the result intended:

> [T]he nature of bankruptcy is to sort out all of the debtor's legal relations with others, and to apply the principles and rules of the bankruptcy laws to those relationships. Bankruptcy is mainly a procedural device, prescribing the method of accomplishing rehabilitation or liquidation, but generally leaving undisturbed legal relationships that existed before bankruptcy . . . .[204]

Where the debtor is an individual, and chapter 7 liquidation is elected, there is a third purpose—providing the debtor with a financial "fresh start"[205] by discharging all eligible debts.[206] In proceedings under chapter 11 or 13, a similar "fresh start" results if the plan of reorganization or arrangement is confirmed.[207]

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[202] U.S. CONST. art. I, § 8, cl. 4.

[203] H.R. REP., *supra* note 17, at 10.

[204] *Id.*

[205] S. REP., *supra* note 106, at 7. The "fresh start" is not available to corporations or other entities eligible to file chapter 7 petitions, for to permit such would "promote trafficking in corporate shells [or partnership shells], a form of bankruptcy fraud." *Id.*

[206] *See* note 131 *supra* ("fresh start" as goal).

[207] Confirmation of a chapter 11 plan discharges debts treated by the plan if (a) the creditors accept the plan or (b) the court confirms the plan over creditor objection. The Code permits confirmation over creditor objection if certain tests are met. 11 U.S.C. §§ 1129, 1141 (Supp. III 1979); *see* note 59 and accompanying text *supra* ("cram down"

Whether the "fresh start" sought by the debtor and his attorney involves rehabilitation or liquidation, the initial impact of the filing of a voluntary petition will be the same in all cases. First, the filing of the petition establishes the date around which many of the remedies and rules of the Code revolve.[208] Further, the filing of the petition invokes the protection or power of the bankruptcy court. From the date of filing until dismissal, confirmation, or discharge, all the debtor's assets are subject to the jurisdiction of the bankruptcy court, irrespective of where those assets are located or in whose possession they may be found.[209]

Perhaps the most important result of invoking the jurisdiction of the bankruptcy court is the automatic stay provision of section 362, which "operates as a stay, applicable to *all entities*"[210] and forbids the continuation or initiation of most civil proceedings for the collection of debts.[211] The availability of this remedy, coupled with the section 541 jurisdictional grant of control of all property of the debtor (the "estate"),[212] means that the filing of a bankruptcy petition effectively insulates most of the debtor's property from most of his creditors until an orderly liquidation can be established under chapter 7 or reorganization is attempted under chapter 11 or 13. The stay gives a "breathing space," and the broadened jurisdictional grant makes the stay

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plan).

Completion of a chapter 13 plan justifies discharge under 11 U.S.C. § 1328(a) (Supp. III 1979). A good faith attempt to complete a plan will support a discharge if creditors have received as much or more than would have been distributed if the case had been a chapter 7 liquidation. *Id.* § 1328(b).

[208] 11 U.S.C. §§ 362(a), 541(a), 544(a), 547(b)(4) (Supp. III 1979). Where creditors are not hammering down the debtor's door, the debtor and his attorney may wish to time the filing of the petition with these provisions in mind. For example, under § 547(b), the trustee may not avoid preferential transfers made more than 90 days before the date of the petition unless the transfer was made to an "insider." *Id.* § 547(b)(4)(A). Transfers to "insiders" may not be attacked if more than one year old. *Id.* § 547(b)(4)(B). If the debtor wishes to protect such transfers, the date of the filing of his petition becomes very important. For a discussion of the term "insider," see notes 199 through 201 and accompanying text *supra.*

[209] 11 U.S.C. § 541 (Supp. III 1979).

[210] *Id.* § 362(a) (emphasis added).

[211] *Id.* § 362(a)(1)-(8).

[212] *Id.* § 541(a); *cf.* 28 U.S.C. § 1471(c)-(e) (Supp. III 1979) (jurisdictional grant to bankruptcy courts). For additional discussion of bankruptcy court jurisdiction, see notes 231 through 233 and accompanying text *infra.*

meaningful and effective.

1. The Automatic Stay

Section 362[213] creates an automatic stay rule applicable to all chapters of the Code and continues the automatic stay policy of the pre-Code Rules of Bankruptcy Procedure.[214]

Congress felt that the automatic stay was a necessary and crucial provision for the Code:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for their debtor's assets prevents that.[215]

The automatic stay can be and frequently is invoked by the filing of a petition while creditors are conducting foreclosure sales or attempting to repossess assets. The stay cuts off any selling, buying, repossessing, adjudicating, or demanding creditor.

Section 362(a)[216] lists eight types of proceedings stayed. In brief, the eight encompass most civil actions to secure and enforce a judgment and most civil proceedings, whether judicial or not, to collect debts and judgments.[217] Also stayed are acts

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[213] 11 U.S.C. § 362 (Supp. III 1979).

[214] *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 405(d), 92 Stat. 2685 (1978). See R. BANKR. P. 144, 401, 601, 1243, and 13-401 for the stay rules applicable under the Bankruptcy Code.

[215] H.R. REP., *supra* note 17, at 340.

[216] 11 U.S.C. § 362(a) (Supp. III 1979).

[217] *Id.* § 362(a)(1)-(3), (7), (8).

designed to perfect or create liens.[218] Even collection letters and telephone calls are stayed.[219]

All legal actions against the debtor are not stayed, however. Section 362(b)[220] exempts from the stay all criminal and certain key civil proceedings. Civil proceedings which may continue include: (1) "Collection of alimony, maintenance or support from property that is not property of the estate;"[221] (2) the acts necessary to perfect a security interest under article 9 of the Uniform Commercial Code where that article has permitted a ten-day grace period for filing a financing statement;[222] (3) commencement, continuation, and enforcement of matters within the police or regulatory power of a governmental unit, although money judgments arising in such a context are stayed;[223] and (4) issuance of tax deficiency notices.[224]

Other civil proceedings not stayed affect less typical situations, such as commodity brokerage[225] and foreclosure of certain mortgages by the Department of Housing and Urban Development.[226] The relief generated by the automatic stay may be short-lived. Creditors seeking relief may file under section 362(d), and relief will be granted for cause shown after notice and a hearing.[227] Usually, even where relief is granted, the automatic stay does generate the "breathing spell" intended by Congress. This gives a debtor or trustee the opportunity to examine and consolidate the assets of the estate.

2. The Estate

The bankruptcy estate comes into existence when the peti-

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[218] *Id.* § 362(a)(4)-(5).

[219] *Id.* § 362(a)(6) stays "*any act* to collect, assess, or recover a claim . . . that arose before commencement of the case." (emphasis added).

[220] *Id.* § 362(b).

[221] *Id.* § 362(b)(2).

[222] *Id.* §§ 362(b)(3), 546(b).

[223] *Id.* § 362(b)(4)-(5).

[224] *Id.* § 362(b)(8).

[225] *Id.* § 362(b)(6).

[226] *Id.* § 362(b)(7).

[227] *Id.* § 362(d). Relief from the stay is usually a complicated and lengthy process in chapter 11 or 13 cases and is an issue that arises after the filing of the petition. Such issues are beyond the scope of this article.

tion is filed.[228] It consists of all legal and equitable interests owned by the debtor in any property as of the date of filing, "wherever that property may be located."[229] In a limited number of cases, property subsequently acquired by the debtor will be included, along with property that the debtor might have transferred to others prior to the date of the petition.[230]

The use of the phrase "wherever . . . located"[231] gives the bankruptcy court jurisdiction over property owned by the debtor located outside the geographical bounds of the federal district where that court sits. That grant, together with the increased jurisdictional powers granted to the bankruptcy court,[232] empowers the court to adjudicate all claims concerning such property, whatever the nature of the claim and without reference to the status of the claim. Thus, even if the jury is out in a tort case filed by or against the debtor, the bankruptcy court can take the case and adjudicate the claim. This makes possible consolidation of all claims by or against the debtor in one case. The bankruptcy court may, however, abstain in appropriate cases.

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[228] *Id.* § 541(a).

[229] *Id.*

[230] *Id.* § 541(a)(3)-(7).

[231] *Id.* § 541(a).

[232] 28 U.S.C. § 1471 (Supp. III 1979) describes the jurisdictional scope of the Code bankruptcy courts:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.
>
> (c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.
>
> (d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.
>
> (e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, whereever [*sic*] located, of the debtor, as of the commencement of such cases.

Never again will bankruptcy practitioners and judges need to wrestle with the concepts of plenary and summary jurisdiction.

Considerations of judicial economy indicate that few cases would be taken from state courts where the process of adjudication had begun. Almost certainly, no case would ever be taken away from a jury.[233]

The new definition for property of the estate eliminates the problems which existed under prior statutory and case law concerning concepts such as "transferability"[234] and "rooted in the pre-bankruptcy past."[235] Also, the definition includes exempt property, which is thereafter released.[236]

Only two forms of property not in existence at the time the petition is filed fall into the estate—inheritances or property settlements and certain forms of income. Section 541(a)(5)[237] provides that property acquired within 180 days after the petition, which would normally not be a part of the estate, will be included in the estate if the property was acquired: (1) "by bequest, devise, or inheritance;"[238] (2) "as result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree;"[239] or (3) by the debtor "as a beneficiary of a life insurance policy or of a death benefit plan."[240]

The estate also acquires the debtor's interest in "[p]roceeds, products, offspring, rents and profits of or from property of the estate."[241] In chapter 7 cases, earnings of the individual debtor generated by work done after the petition are excluded from the estate.[242] However, earnings due for work done prior to the petition, accrued vacation pay and the like, are property of the estate.[243] Earnings naturally fall into the chapter 13 estate,[244] since

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[233] *See* note 232 *supra.*

[234] *See, e.g.,* Segal v. Rochelle, 382 U.S. 375, 381-85 (1966) (potential claims for loss-carryback tax refund transferable).

[235] *See, e.g.,* Kokoszka v. Belford, 417 U.S. 642, 647 (income tax refund is property), *rehearing denied,* 419 U.S. 886 (1974).

[236] 11 U.S.C. § 522(b) (Supp. III 1979).

[237] *Id.* § 541(a)(5).

[238] *Id.* § 541(a)(5)(A).

[239] *Id.* § 541(a)(5)(B).

[240] *Id.* § 541(a)(5)(C).

[241] *Id.* § 541(a)(6).

[242] *Id.*

[243] Thus, cases such as Lines v. Fredrick, 400 U.S. 18, 20 (1970) (per curiam), which held that accrued but unpaid vacation pay did not pass to a trustee, are overruled by statute.

that chapter proposes to use the individual debtor's income to adjust his debts.

There is no mention of the earnings of an individual chapter 11 debtor, but logic indicates that an individual involved in chapter 11 would need to devote his earnings to funding the plan. Thus, circumstances would probably dictate that his earnings would fall into the estate. Nevertheless, there is no such requirement, and an individual chapter 11 debtor with income from sources outside the chapter 11 estate might be able to assert the earnings exclusion of section 541(a)(6).[245] Finally, the estate includes property which the debtor has transferred to others but which may be recovered by the trustee under the various provisions dealing with avoidable preferences and fraudulent conveyances.[246]

Exemption of property by the individual debtor,[247] so that he will have the bare minimum necessary for a "fresh start," occurs after the filing of the petition, even though the schedules filed with the petition require the debtor to list property which he claims to be exempt.[248]

3. Exempt Property

a. Availability of Property to Exempt for the Debtor's "Fresh Start"

An analysis of the availability of property eligible for exemption will often help to determine whether an individual debtor should elect chapter 7 or chapter 13, for most, if not all[249] individual consumer debtors are restricted to those chapters.

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[244] 11 U.S.C. § 1306(a)(2) (Supp. III 1979).

[245] *Id.* § 541(a)(6). The failure of chapter 11 to treat the earnings of individuals does provide support for Judge Lavien's conclusion that Congress did not intend to permit consumer chapter 11 cases. *See* notes 121 through 123 and accompanying text *supra.*

[246] 11 U.S.C. § 541(a)(3)-(4) (Supp. III 1979).

[247] *Id.* Section 522(a) makes exemptions available only to individual debtors. Exempt property is considered necessary to enable the bankrupt individual to get his "fresh start"; without exempt property, the naked bankrupt, along with his dependents, would be faced with one of two alternatives: starvation or the public dole.

[248] *See* INTERIM R. BANKR. P. Form 6, Schedule B-4.

[249] *See* notes 44 through 75 and accompanying text *supra.*

If the debtor files under chapter 7, he surrenders to his secured creditors all collateral subject to their claims,[250] surrenders all non-exempt property to the trustee for liquidation and distribution of proceeds to creditors, and retains any remaining exempt property for his "fresh start." If all the property which would ordinarily be exempt has been pledged as collateral to secured creditors, the chapter 7 debtor could have nothing left for the new beginning. Where chapter 13 is selected, the debtor retains all his property, pays secured creditors in full, pays some percentage to unsecured creditors under a court approved plan,[251] and is discharged from the balance of his unsecured debt.

An individual debtor with few or no secured creditors would be best advised to use chapter 7, exercising the property exemptions available and discharging his unsecured debt. A debtor with many secured creditors, who would probably lose his automobile, furniture, and possibly his home, should consider using chapter 13.

Unfortunately, the decision is not that simple in most cases. The debtor's attorney must also consider several other provisions of the Code. For example, assume that a debtor has purchased an automobile on credit, giving a security interest to secure repayment. This is his only secured debt. Should he file under chapter 13 in order to retain possession? Not necessarily. He may file under chapter 7 and then negotiate with the creditor to reaffirm the debt and lien under section 524(c).[252] Although the court must approve most reaffirmation agreements, approval should pose no problem where reaffirmation enables the debtor to retain possession and use of an automobile or other property, particularly where the discharged debtor would need to purchase such property if he lost it during the bankruptcy.[253] If payments

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[250] 11 U.S.C. § 522(f)(2) (Supp. III 1979) provides an exception to this rule; *see* note 259 and accompanying text *infra*.

[251] *See* notes 67 through 74 and accompanying text *supra* (chapter 13 cases).

[252] 11 U.S.C. § 524(c) (Supp. III 1979).

[253] The court must investigate reaffirmations not involving debts secured by realty and determine that reaffirmation will not impose undue hardship on the debtor or his dependents and is in his best interests. Alternatively, the court may approve reaffirmation where the reaffirmation was "entered into in good faith . . . in settlement of litiga-

on a secured debt are current or can be brought current and the debtor continues to make installment payments following the filing of the petition, creditors should be receptive to a request for reaffirmation.

Of course, where the value of the collateral is much less than the outstanding balance, the debtor should not be advised to reaffirm. Rather, he should attempt to use the redemption provision, section 722. The right to redemption is not waivable and permits a debtor in chapter 7 to redeem tangible personalty subject to lien. Only property "intended primarily for personal, family or household use"[254] is redeemable, and the property must be either exempt or have been abandoned by the trustee. The trustee generally abandons to the secured creditor property subject to a security interest if the property cannot be sold for more than the "allowed secured claim" against it. If the property in question qualifies, the debtor may redeem by paying to the secured creditor "the amount of the allowed secured claim."[255]

The phrase "allowed secured claim" refers to a determination made concerning all secured claims under section 506.[256] Under the provisions of section 506, the value of a secured claim is determined by reference to the value of the collateral, so that where the collateral is worth less than the claim, the allowed secured claim is the value of the collateral, and the balance due becomes an unsecured claim.[257]

b. Section 522(f)

Certain liens and secured claims, which would ordinarily strip the debtor of exempt property, may be disallowed. First, all judicial liens filed against exempt property fail in bankruptcy

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tion" concerning dischargability or redemption. *Id.* § 524(c)(4).

Reaffirmation agreements are treated extensively by the local rules in both Mississippi districts. *See* LOCAL R. BANKR. P., S.D. MISS., 1(10), 2; *id.*, N.D. MISS., 12. See Appendix *infra* for such local rules.

[254] 11 U.S.C. § 722 (Supp. III 1979).

[255] *Id.*; *see* LOCAL R. BANKR. P., S.D. MISS., 1(6), (10). See Appendix *infra* for such local rule.

[256] 11 U.S.C. § 506 (Supp. III 1979).

[257] *Id.*

under section 522(f)(1).[258] This rule is not new. After all, state exemption laws merely create property exempt from levy under judicial proceedings. Section 522(f)(2) goes further. That section avoids any lien which is:

> a nonpossessory, nonpurchase-money security interest in any—
>
> (A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
>
> (B) implements, professional books, or tools, of the debtor or the trade of a dependent of the debtor; or
>
> (C) professionally prescribed health aids for the debtor or a dependent of the debtor.[259]

Although the section is very useful, it is limited in application to the types of property listed—household furnishings, goods, apparel, etc. No other types of property are protected by the provision.[260]

The constitutionality of a retroactive application of section 522(f)(2) has been challenged in a number of recent bankruptcy proceedings. Creditors have begun to argue that the application of the section to interests arising prior to either the passage of the Code (November 6, 1978) or the effective date of the Code (October 1, 1979) would be an unconstitutional taking of property without due process in violation of the fifth amendment.[261]

The bankruptcy courts have taken three approaches to this fifth amendment issue. Some courts have upheld the constitutionality of the statute without reservation.[262] Other courts have

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[258] *Id.* § 522(f)(1).

[259] *Id.* § 522(f)(2). Note that LOCAL R. BANKR. P., S.D. MISS., 4, see Appendix *infra*, requires that the exemption created by 522(f) be claimed by particular reference in Schedule B-4 at the time the schedules are filed. *See* note 359 *infra*.

[260] *See In re* Ruppe, 3 B.R. 60, 61 (Bankr. Ct., D.C. 1980) (movie projector and camera not "household goods"); *In re* Abt, 2 B.R. 323, 326 (Bankr. Ct., E.D. Pa. 1980) (automobile not "household goods").

[261] *See* notes 262 through 266 and accompanying text *infra* (discussing fifth amendment). Other creditors have asserted that the tenth amendment protects their interest in these cases. Unfortunately for these creditors, the tenth amendment prohibits states, not Congress, from passing laws that impair contracts. *See In re* Ambrose, 4 B.R. 395, 398 (Bankr. Ct., N.D. Ohio 1980) (Congress may legislate bankruptcy law while state cannot).

[262] *E.g., In re* Rutherford, 4 B.R. 510, 513 (Bankr. Ct., S.D. Ohio 1980) (§ 522(f)

declared any retroactive application of the statute to the period before the enactment of the statute to be unconstitutional. Thus, any lien or security agreement effective before November 6, 1978, cannot be affected.[263] Finally, still other courts have held that liens affixed or interests perfected prior to the effective date of the Code, October 1, 1979, are constitutionally protected.[264]

Among the various approaches taken, that of Bankruptcy Judge Berry of the Western District of Oklahoma is perhaps the least controversial.[265] Judge Berry has decided that retroactive application of section 522(f) to a security interest entered into prior to enactment of the Code would be unconstitutional. He first determined that the Supreme Court had not permitted retroactive application of the Bankruptcy Act or the Chandler Act. The Supreme Court had never reached the issue whether Congress could make bankruptcy laws retroactive. Rather, the Court found that Congress had simply not done so. Applying similar reasoning, Judge Berry concluded that Congress had simply not made the Code retroactive.[266]

Although this is an attractive solution which avoids the troublesome constitutional issue, an argument could certainly be made that the text of the Bankruptcy Reform Act indicates that Congress intended to make the Code retroactive. Section 403 of the Reform Act contains a savings clause making the Bankruptcy Act applicable to cases filed prior to the effective date of the Code (October 1, 1979), and section 402 clearly states that the Code provisions will apply to and control any case filed thereafter.[267] Thus, unless the Code applies retroactively, no

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constitutional).

[263] *E.g., In re* Lucero, 4 B.R. 659, 661 (Bankr. Ct., D.C. 1980) (application of § 522(f) to pre-enactment liens unconstitutional).

[264] *E.g., In re* Head, 4 B.R. 521, 524 (Bankr. Ct., D. Tenn. 1980) (§ 522(f) constitutionally applied to cases filed after Oct. 1, 1979).

[265] *In re* Pierce, No. 80-00033 (Bankr. Ct., W.D. Okla., June 17, 1980) (reported at 51 OKLA. B.J. 2320 (1980)).

[266] *In re* Pierce, No. 80-00033 (Bankr. Ct., W.D. Okla., June 17, 1980) (reported at 51 OKLA. B.J. 2320, 2323 (1980)).

[267] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 402-403, 92 Stat. 2682 (1978). A similar argument is advanced by the courts in *In re* Rodrock, 3 B.R. 629, 634-35 (Bankr. Ct., D. Colo. 1980), and *In re* Ambrose, 4 B.R. 395, 398-99 (Bankr. Ct., N.D.

bankruptcy law exists to be applied to cases filed after October 1, 1979, which concern transactions entered into before that date.

A more direct assault upon the section can be found in *In re Rodrock*.[268] Relying upon a 1935 decision of the Supreme Court, *Louisville Joint Stock Bank v. Radford*,[269] the bankruptcy court ruled that despite the Constitution's grant of exclusive bankruptcy jurisdiction to Congress, the exercise of that jurisdiction is still limited by the fifth amendment.[270] The *Rodrock* court went on to examine the application of section 522(f). The interest of the disgruntled creditor had arisen prior to enactment (November 8, 1978). The court decided that application of the section to interests arising prior to enactment would result in a taking without due process.[271] *Rodrock* was carefully considered and appears to have been well-briefed, since the United States intervened on behalf of the trustee. The court's conclusion concerning the application of the section to liens or security agreements dated before the passage of the Code deserves consideration.

For a well-reasoned case reaching an opposite result and upholding the constitutionality of the section, the debtor's counsel might refer to *In re Ambrose*.[272] Although the *Ambrose* court recognized the precedential value of *Radford*,[273] it did not find a violation of the fifth amendment:

> Section 522(f) . . . is addressed to the legimate end of protecting the debtor's exemptions, his discharge, and thus his fresh start and the means taken, permitting the debtor to avoid certain liens on certain exempt property, are reasonable and appropriate to that end. For the provisions of the [Code] to violate the Fifth Amendment, they must be so grossly arbitrary and unreasonable as to be incompatible with fundamental

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Ohio 1980).

[268] 3 B.R. 629 (Bankr. Ct., D. Colo. 1980).

[269] 295 U.S. 555 (1935).

[270] 3 B.R. at 632.

[271] *Id.*

[272] 4 B.R. 395 (Bankr. Ct., N.D. Ohio 1980).

[273] *Id.* at 398-99.

law.[274]

Assuming that, under these provisions, there is property available for exemption—property available for that "fresh start"—the debtor and his attorney may also use the Code to decide what property to preserve.

4. Electing an Exemption Statute

The general availability of exemptions for a debtor and his property will frequently be the crucial factor, without any reference to the issue discussed above. Depending upon the state in which the petition is filed, as well as the state where the property is located, a debtor may qualify for two types of exemptions.

Section 522(b) permits debtors to elect either state law exemptions or those provided by section 522(d) of the Code.[275] Section 522(b)(1) also provides that states may elect to prohibit the use of section 522(d).[276] States that have done this include Louisiana and Tennessee.[277] Even where state law has prohibited use of the federal exemptions, however, section 522(f)[278] may still be used to negate non-purchase money liens against property exempt under a state exemption statute.[279]

A bill was introduced in the 1980 Mississippi legislative session to revise the Mississippi exemption statutes, but that bill did not contain provisions prohibiting the use of section 522(d).[280] Generally, state law exemption schemes are more

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[274] *Id.* at 401.

[275] 11 U.S.C. § 522(b)(1) (Supp. III 1979). Actually, the election of state or local exemption law will also mean that the debtor will have the protection of certain specific federal exemption statutes. *See* 5 U.S.C. § 8346(a) (1976 & Supp. III 1979) (federal retirement); 38 U.S.C. § 1301(a) (1976) (veterans' benefits); 42 U.S.C. § 407 (1976) (Social Security).

[276] 11 U.S.C. § 522(b)(1) (Supp. III 1979).

[277] LA. REV. STAT. ANN. § 13:3881(B) (West Supp. 1981); TENN. CODE ANN. § 26-2-112 (1980).

[278] *See* notes 258 through 260 and accompanying text *supra*.

[279] *See In re* Boozer, 4 B.R. 524, 527 (Bankr. Ct., N.D. Ga. 1980) (household goods exempt).

[280] The Mississippi Uniform Exemptions Act, H.B. 80-936, Miss. Leg., 2d Sess. (1980). This bill was not passed by the legislature in 1980, but efforts to gain its passage continue.

favorable where the debtor has substantial equity in his homestead. For example, Mississippi's homestead exemption is $30,000.[281] In comparison, section 522(d)(1) exempts only $7,500 in property used as a residence.[282]

The federal exemption scheme, however, is much more favorable than most state laws where personalty is concerned. The federal exemption for "household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments" is $200 in any item. The aggregate value of items is unlimited.[283] Compare the archaic listing of similar items—such as "two head of cows and calves"—in the Mississippi exemption statute.[284]

The easiest way to compare the federal and Mississippi exemption statutes is in tabular form.[285] The following tables compare section 522(d), present Mississippi law, and the exemption revision bill that was introduced in the Mississippi Legislature. Although this bill has not yet been passed by the legislature, efforts to gain passage continue, and its provisions serve as a guide to future legislation.

Table I: The Homestead Exemption

Bankruptcy Code	Mississippi	Mississippi (Proposed)
$7,500 worth of real or personal property used as a residence by debtor or a dependent of debtor[286]	$30,000 in land, buildings owned and occupied by the debtor (limited to 160 acres)[287]	$30,000 in real or personal property used as a residence by debtor or his dependents[288]
May also be applied to burial plots	No provision for burial plots	No provision for burial plots

[281] MISS. CODE ANN. § 85-3-21 (Supp. 1981).

[282] 11 U.S.C. § 522(d)(1) (Supp. III 1979).

[283] *Id.* § 522(d)(3).

[284] MISS. CODE ANN. § 85-3-1(h)(ii) (Supp. 1981).

[285] This table is based, in part, upon a term paper by Mr. Geary Grimes, a third year law student at the University of Mississippi School of Law. Mr. Grimes submitted the paper in the course entitled "Creditors' Rights" during the Spring Semester, 1980.

[286] The federal exemption applies to any property, personal or real. No homestead declaration is required. 11 U.S.C. § 522(d)(3) (Supp. III 1979). Further, if not used, in full or in part, the balance of the $7,500 can be used to exempt other assets. *Id.* § 522(d)(5); *see* note 297 and accompanying text *infra*.

Most Americans today have more invested in personalty than in realty. Among the most important items of personal property owned by most debtors are automobiles, yet only the Code provides expressly for an automobile exemption.

Table II: Automobile Exemption

Bankruptcy Code	Mississippi	Mississippi (Proposed)
$1,200 in one automobile[289]	None	None

As noted above, the exemptions generally available for personalty are much better under the Code than under either present or proposed Mississippi law.

Table III: Personalty

A. Household Furnishings, Goods, Wearing Apparel, Appliances, Books, Animals, Crops or Musical Instruments

Bankruptcy Code	Mississippi	Mississippi (Proposed)
$200 in any one item[290] (There is no limit on the aggregate value.)	(a) If "head of a family," (1) either $250[291] or (2) the following enumerated items: 2 work horses or mules, one yoke oxen, 2 cows and calves,	$200 in any item to an aggregate or total value of $5,000[294]

[287] MISS. CODE ANN. § 85-3-21 (Supp. 1981). The exemption is only available for realty. The debtor need not have declared property as homestead. Mississippi law preserves the exemption in event no selection is made. *Id.* §§ 85-3-27, -31.

[288] Like the federal exemption, it protects all residences, whether personal or real. H.B. 80-936, *supra* note 280, § 5.

[289] 11 U.S.C. § 522(d)(2) (Supp. III 1979).

[290] *Id.* § 522(d)(3).

[291] MISS. CODE ANN. § 85-3-23 (Supp. 1981).

[292] *Id.* § 85-3-1(h)(i)-(xx).

10 head hogs,
20 sheep,
20 goats,
all poultry,
all colts under 3 years
raised in Mississippi by
the debtor,
250 bushels corn,
10 bushels wheat or
rice,
500 pounds pork,
bacon, or other meat,
100 bushels cotton
seed,
one wagon and one
buggy or cart with
harnesses for each,
500 bundles fodder,
1,000 pounds hay,
40 gallons sorgum or
molasses or syrup,
1,000 stalks sugar cane,
1 molasses mill and
equipment not worth
more than $250,
2 bridles,
1 saddle,
1 side saddle,
1 sewing machine,
household and kitchen
furniture not exceeding
$1,200 in value,
all family portraits,
1 mower and rake for
cutting hay and grain[292]

(b) In addition,
whether head of a
family or not, exempt
property includes:
all personal libraries,
"including pictures and
drawings," to the value
of $3,000[293]

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[293] *Id.* § 85-3-1(f).

B. Jewelry

Bankruptcy Code	Mississippi	Mississippi (Proposed)
$500 of personal jewelry[295]	None	Any individual items of jewelry worth $200 or less (however, the aggregate value of jewelry exempted must be included in the $5,000 household goods exemption)[296]

C. General Exemption (The "Wild Card")

Bankruptcy Code	Mississippi	Mississippi (Proposed)
$400 in "any item". Further, any unused portion of the residence exemption of $7,500 may be used here for a total possible exemption of $7,900[297]	None	None

D. Tools of the Trade

Bankruptcy Code	Mississippi	Mississippi (Proposed)
$750 in aggregate value in books, professional tools of the trade of debtor or dependent of debtor[298]	Tools of mechanic necessary for his trade, agricultural implements of farmer necessary for two male laborers, implements of laborer	$750 in aggregate value in books, professional tools of trade[300]

[294] H.B. 80-936, *supra* note 280, § 10(1).

[295] 11 U.S.C. § 522(d)(4) (Supp. III 1979).

[296] H.B. 80-936, *supra* note 280, § 10(1).

[297] 11 U.S.C. § 522(d)(5) (Supp. III 1979). Perhaps the most useful of the federal exemption provisions, this "wild card" can be applied to any asset in which the debtor claims an interest, including cash. *See In re* Upright, 1 B.R. 694, 701-02 (Bankr. Ct., N.D.N.Y. 1979) (cash from trustee's sale of merchandise exempted).

[299] 11 U.S.C. § 522(a)(6) (Supp. III 1979).

necessary in usual employment,
books of student necessary to complete education,
all wearing apparel,
instruments of surgeons or dentists to $5,000 in value,
globes and maps used by teachers.
In lieu of the above mentioned items, the debtor may elect to exempt any tangible personal property of a value not exceeding $6,500. This property may include one or more of the above mentioned items, but the total value of exempt property cannot exceed $6,500.[299]

E. Unmatured Life Insurance Contracts

Bankruptcy Code	Mississippi	Mississippi (Proposed)
Any unmatured life insurance contract owned by debtor.[301] Further, the debtor may exempt up to $4,000 in loan or cash	None	Any unmatured life insurance contract owned by debtor with cash surrender or loan value of $5,000 or less[303]

[299] MISS. CODE ANN. § 85-3-1(a)-(f), (h) (Supp. 1981).

[300] H.B. 80-936, *supra* note 280, § 10(2).

[301] 11 U.S.C. § 522(d)(7) (Supp. III 1979). H.R. REP., *supra* note 17, at 361, explains this exemption in the following manner:

> This paragraph refers to the life insurance contract itself. It does not encompass any other rights under the contract, such as the right to borrow out the

surrender value in any unmatured life insurance contract which he owned and under which the insured is either the debtor or a person of whom the debtor is a dependent.[302]		

F. Health Aids

Bankruptcy Code	Mississippi	Mississippi (Proposed)
Any health aid "[p]rofessionally prescribed" for debtor or any dependent of debtor[304]	None	All health aids "reasonably necessary" to enable the individual or a dependent to work or to sustain health[305]

G. Wages Earned After Filing

Bankruptcy Code	Mississippi	Mississippi (Proposed)
Wages accrued after the date of the petition of the chapter 7 case are not part of the estate.[306] In chapter 13, wages are not exempt and are part of the estate.[307]	The Code controls treatment of wages and excludes them, even where state exemptions are elected. Outside of bankruptcy, Mississippi has adopted the standards set forth by the Federal	The Code controls bankruptcy cases; outside of bankruptcy the proposed act would use the same rules as the Federal Consumer Credit Act, protecting at least 75% of wages, *etc.*[310] Where support

loan value. Because of this provision, the trustee may not surrender a life insurance contract, which remains the property of the debtor if he chooses the Federal exemptions.

[302] 11 U.S.C. § 522(d)(8) (Supp. III 1979).

[303] H.B. 80-936, *supra* note 280, § 9.

[304] 11 U.S.C. § 522(d)(9) (Supp. III 1979).

[305] H.B. 80-936, *supra* note 280, § 7(b).

[306] 11 U.S.C. § 541(a)(6) (Supp. III 1979).

[307] *Id.* § 1306(a)(2).

	Consumer Credit Act,[308] protecting at least 75% of *disposable* income.[309]	orders are involved, 50% of disposable income may be garnished.[311]

H. Other Payments Due the Debtor

Bankruptcy Code	Mississippi	Mississippi (Proposed)
1. Limited to Amount Necessary to Support Debtor or Dependents		
Alimony, support and maintenance payments,[312] pensions and the like paid on illness, death, or retirement,[313] wrongful death benefits paid to debtor as dependent of deceased,[314] life insurance paid on life of person of whom debtor a dependent,[315] payments to compensate debtor or person of whom debtor was dependent for loss of future earnings[316]	None	Benefits for medical, surgical or hospital care used to pay for care of debtor or dependent of debtor.[317]
2. Limited to Specified Amount		
Up to $7,500 paid to debtor or person of	$50,000 in life insurance proceeds	$10,000 in proceeds from judg-

[308] 15 U.S.C. § 1672(b) (1976).

[309] MISS. CODE ANN. § 85-3-4 (Supp. 1981).

[310] H.B. 80-936, *supra* note 280, § 5(2). The proposed statute treats alimony and separate maintenance as wages. *Id.* § 5(a)(1).

[311] *Id.* § 5(3)(b).

[312] 11 U.S.C. § 522(d)(10)(D) (Supp. III 1979).

[313] *Id.* § 522(d)(10)(E).

[314] *Id.* § 522(d)(11)(B).

[315] *Id.* § 522(d)(11)(C).

[316] *Id.* § 522(d)(11)(E).

[317] H.B. 80-936, *supra* note 280, § 9(a).

whom debtor is a dependent for personal bodily injury, not including pain and suffering[318]	paid to beneficiaries of deceased debtor[319] $5,000 in life insurance proceeds paid to estate of deceased debtor,[320] personal injury claims of the debtor to maximum of $10,000[321]	ment or insurance for bodily injury or wrongful death of debtor or dependent of debtor,[322] $50,000 in proceeds from life insurance policy paid on death of debtor's spouse or dependent,[323]
	3. Unlimited in Amount	
Social Security payments, unemployment benefits, local public assistance,[324] Veteran's benefits,[325] disability or illness benefits,[326] awards under a crime victim reparations act.[327]	Generally speaking, federal benefits such as social security, veteran's benefits, military and federal retirement payments are exempt from levy,[328] as is income from disability insurance[329] State[330] and municipal retirement benefits are generally exempt.[331] Unemployment benefits[332] and	Social Security payments, unemployment benefits,[336] Veteran's benefits,[337] pensions, *etc.*, paid on illness, retirement, and so forth,[338] child support received by the debtor.[339]

[318] 11 U.S.C. § 522(d)(11)(D) (Supp. III 1979).
[319] MISS. CODE ANN. § 85-3-11 (1972).
[320] *Id.* § 85-3-13.
[321] *Id.* § 85-3-17.
[322] H.B. 80-936, *supra* note 280, § 9(a).
[323] *Id.* § 9(b).
[324] 11 U.S.C. § 522(d)(10)(A) (Supp. III 1979).
[325] *Id.* § 522(d)(10)(B).
[326] *Id.* § 522(d)(10)(C).
[327] *Id.* § 522(d)(11)(A).
[328] *See* note 275 *supra* (federal exemption statutes).
[329] MISS. CODE ANN. § 85-3-1(j)(ii) (Supp. 1981).

	workmen's compensation benefits are exempt,[333] as are alimony or child support paid to the debtor.[334]	
	Where debtor died during the pendency of any suit and such suit was revived by an administrator, any recovery is exempt where the debtor left surviving a spouse, child, father or mother.[335]	
4. Proceeds Due on Sale/Proceeds from Casualty Loss		
None	All proceeds due on sale of or for casualty loss of any exempt property, real or personal,[340] remain exempt.	None

In conclusion, several important points concerning the exemption of assets must be noted. First, the initial election of exemptions may be binding if too much time elapses prior to an attempt to change the election or if prejudice to creditors might result if such new election were to be permitted.[341] Second,

[330] *Id.* § 25-11-129 (1972).

[331] *Id.* § 21-29-51.

[332] *Id.* § 71-5-539.

[333] *Id.* § 71-3-43.

[334] *Id.* § 85-3-1(k) (Supp. 1981).

[335] *Id.* § 85-3-19 (1972).

[336] H.B. 80-936, *supra* note 280, § 7(c).

[337] *Id.* § 7(e).

[338] *Id.* § 7(f).

[339] *Id.* § 7(g).

[340] MISS. CODE ANN. § 85-3-1(j)(i) (Supp. 1981).

[341] *See In re* Duggan, 4 B.R. 709, 711 (Bankr. Ct., N.D. Tex. 1980) (change of election prohibited). The decision was based on R. BANKR. P. 403, concerning the time within which claims to exemptions are subject to attack. 4 B.R. at 711. R. BANKR. P.

where a joint petition under section 302[342] is filed, two sets of exemptions are available.[343] Third, although a debtor may not mix-and-match his exemptions,[344] there appears to be no reason why a husband and wife, filing jointly, could not each elect a separate scheme, one choosing federal exemptions and the other state exemptions. Finally, the goods claimed to be exempt, their location, and the statute under which the exemption is claimed must be set forth in schedule B-4,[345] which must be filed with the petition.[346]

5. Trustee

The filing of a petition under either chapter 7 or chapter 13 will result in the automatic appointment of a trustee.[347] The

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403(c) provides that if no objection is filed to the trustee's report concerning the debtor's claimed exemptions within 15 days of the filing of that report, the report cannot thereafter be challenged. The rule was not directly on point, but the *Duggan* court felt that it provided the framework for a proper ruling, holding, "At some point the right to switch from one system to another must end and there be some finality to a choice." 4 B.R. at 711.

In *In re* Mertsching, 4 B.R. 519 (Bankr. Ct., D. Idaho 1980), however, the court permitted the debtor to switch from state to federal exemptions, finding the first election to have been improvident and finding no prejudice to creditors. *Id.* at 519. The estate was taxed $50.00 for the additional cost of administration resulting from the extra duties the change imposed upon the trustee. *Id.*

[342] 11 U.S.C. § 302 (Supp. III 1979).

[343] *See In re* Thompson, 2 B.R. 380, 381 (Bankr. Ct., E.D. Va. 1980) (joint debtor entitled to separate exemption).

[344] *See In re* Nichols, 4 B.R. 711, 716 (Bankr. Ct., E.D. Mich. 1980) (debtor may not combine exemptions).

[345] INTERIM R. BANKR. P. Form No. 6.

[346] *See* 11 U.S.C. §§ 301, 303 (Supp. III 1979) (petition required to institute proceedings); *id.* § 521(1) (list of creditors, assets, and liabilities required). R. BANKR. P. 108 requires the filing of statements and schedules within 10 days of filing a voluntary petition, unless the court grants an additional 10 days. Any extension beyond 20 days can only be granted by the court for cause shown.

In their local rules, the Mississippi bankruptcy judges have also provided for the filing of the statements and schedules. *See* LOCAL R. BANKR. P., N.D. MISS., 6 (requirements similar to federal rule); LOCAL R. BANKR. P., S.D. MISS., 1 (same). See Appendix *infra* for such local rules.

In a chapter 13 bankruptcy, INTERIM R. BANKR. P. 13001 requires the filing of a list of exemptions as "if the debtor's estate were [to be] liquidated under Chapter 7."

[347] 11 U.S.C. §§ 701(a), 1302(a) (Supp. III 1979).

filing of a chapter 11 case will not. The chapter 11 debtor-in-possession has many of the powers of a trustee,[348] however, and a chapter 11 trustee will be appointed where a need is shown.[349] Although the power and role of the trustee cannot be overstated, that power is exercised and that role is played out in the months following the filing of the petition and will not be discussed in detail in this article. The existence of the trustee will often determine the election between chapter 7 and chapter 13 and a chapter 11 case. An attorney contemplating the choice between chapter 7 and chapter 13 might find it significant that the chapter 13 trustee's duties include the duty to advise the debtor on nonlegal matters and assist the debtor in performing under the chapter 13 plan.[350]

6. Summary

The stay, the creation of the estate, the ability to elect and specify exemptions, and the appointment of the trustee are important events which occur at the commencement of a bankruptcy proceeding. While each imposes duties upon the debtor, each also provides certain benefits, the most important being the choice of liquidation or reorganization. The debtor's attorney, as he attempts to decide whether to advise filing or some course of action outside bankruptcy, must try to determine whether the benefits outweigh the disadvantages. Once started, it may be impossible to turn back, for the court can refuse to permit a voluntary dismissal.[351]

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[348] *Id.* § 1107(a). "[A] debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter." *Id.*

[349] *Id.* § 1104(a). Cause to appoint a trustee includes fraud, dishonesty, incompetence, or if appointment of a trustee would be in the interests of creditors or equity security holders.

[350] *Id.* § 1302(b)(3).

[351] Under 11 U.S.C. § 305(a)(1) (Supp. III 1979), the court may dismiss a case if "the interests of creditors and the debtor would be better served by such dismissal." Additionally, upon notice and a hearing and for cause shown, a case may be dismissed under §§ 707, 927, 1112(b), 1307(c). Chapter 11 and chapter 13 cases, however, may not be dismissed if continuation is "in the best interest of creditors and the estate." *Id.* §§ 1112(b), 1307(c). Although neither chapter 7 nor chapter 9 imposes such a "best in-

III. Filing the Petition

Procedures governing the filing and subsequent conduct of a bankruptcy proceeding are found in four different sources: (1) the Bankruptcy Code; (2) the Rules of Bankruptcy Procedure;[352] (3) the Interim Rules of Bankruptcy Procedure;[353] and (4) Local Rules of Bankruptcy Procedure.[354] The bankruptcy practitioner must be as familiar with the rules as he is with the Code; thus, the following discussion attempts to integrate the various rules with the Code.

A. The Forms Required

Filing a voluntary bankruptcy petition, unlike filing a complaint in an ordinary federal civil action, is not a simple matter. Although the petition is, in and of itself, a short, uncomplicated document, the statements and schedules which must also be filed are difficult, detailed, and, all too frequently, confusing. The basic forms are the petition, the statement of affairs, and the schedules. Also filed are two supplementary but necessary items, the required disclosure of attorney's fees and the matrix list of creditors. These are official forms and are available with

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terest" test, the courts will probably adopt some such standard. For example, in *In re* Reynolds, 4 B.R. 703 (Bankr. Ct., D. Me. 1980), the court denied the debtor's motion to dismiss a chapter 7 petition. *Id.* at 704. The court concluded that the debtor had failed to show cause for dismissal required by § 707 of the Code. 4 B.R. at 704. Additionally, the court noted that dismissal might prejudice creditors who had relied upon the petition as filed. *Id.* Thus, the court's holding was at least partially based upon the "best interest" of the creditors test.

[352] The Rules of Bankruptcy Procedure, originally promulgated under the Bankruptcy Act, remain in effect until new rules are proposed and adopted, unless the old rule is in conflict with the Code. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 405(d), 92 Stat. 2685 (1978).

[353] The Interim Bankruptcy Rules were prepared to provide guidance in applying existing bankruptcy rules where appropriate under the new Code and to fill gaps in the present rules created by the new Code. 11 U.S.C.A. Interim Bankruptcy Rules at III (Sp. Pamph. 1981). It is important to remember that the Interim Rules are only suggestions made by the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States, and as such are not authority to be consulted unless adopted by the court. Both Mississippi bankruptcy court districts have adopted the Interim Rules. In the Northern District, however, certain changes have been made. Local R. Bankr. P., N.D. Miss., 2. See Appendix *infra* for such local rule.

[354] The local rules for both Mississippi districts are attached as the Appendix.

any copy of the Interim Rules of Bankruptcy Procedure and in many other semiofficial sources. The Interim Rules also contain other official forms. Because of their complexity, it is strongly recommended that the forms be purchased from a legal stationer. Attempting to copy the forms from another source for use in a case would be difficult, time consuming, and, therefore, expensive.

Bankruptcy proceedings, at least chapter 7 proceedings, are unlike other federal civil cases in another respect. If the forms are completed properly, there will be little or no work for the debtor's attorney to do after the filing. This is not true in the more complex proceedings under chapter 11 or chapter 13, which do require the filing of plans and other documents subsequent to the filing of the petition. Also, chapter 11 and chapter 13 cases will usually require complex and detailed negotiations between the debtor and his creditors.

There are five forms which must be filed to initiate a voluntary bankruptcy—the petition, the statement of affairs, the schedules, the disclosure of attorney's fees, and the matrix list of addresses. In addition, in a chapter 11 case the debtor must provide several special lists of creditors,[355] and a chapter 13 debtor must file a "Chapter 13 Statement."[356]

It is beyond the scope of this article to analyze and annotate the forms in any detail. The new edition of *Collier on Bankruptcy* devotes an entire volume[357] to the various forms and their annotation. Nevertheless, there are special problems which can be highlighted.

1. The Petition

The basic petition form, Official Form No. 1, is quite simple.[358] The second paragraph of the petition requires a statement that the debtor qualifies under the venue provisions, which are simple: The debtor must have had a residence or a principal place of business in the district where the petition is filed during

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[355] INTERIM R. BANKR. P. 1007(a).
[356] *Id.* 13001.
[357] 6 W. COLLIER, *supra* note 97.
[358] INTERIM R. BANKR. P. Form No. 1.

the 180 days preceding the filing.[359] Of course, the debtor and his creditors may waive venue.

Paragraph four of the petition must be completed in a chapter 11 or chapter 13 petition. This paragraph simply states that a dated copy of the proposed plan is attached or that the petitioner intends to file a plan pursuant to chapter 11 or chapter 13 of title 11 of the United States Code.

Although the chapter 11 or chapter 13 petitioner is not required to file a plan with the petition,[360] the petitioner may do so and would be well advised to consider doing so if the circumstances permit. In the appropriate case, a debtor might consult with key creditors prior to filing his petition. If his creditors are very hostile, the debtor might not want to attempt a chapter 11 reorganization or chapter 13 arrangement. If the creditors are friendly, the debtor might be able to frame an acceptable plan with creditor's cooperation, and thus conserve the time and energy that typically are involved in the preparation and negotiation of chapter 11 and chapter 13 plans prepared and filed in the post-petition period. Admittedly, few debtors will have this much freedom of action. Most bankruptcies seem to be filed just as the sheriff appears at the door.

Form No. 2[361] is the only other voluntary petition form in use under the Interim Rules, and it is used in joint cases. It presents no special difficulties.

Involuntary cases are initiated using Form No. 9.[362] The form is designed for use where three or more creditors unite to file the petition and will require modification if used by one creditor. If one creditor files the petition, a paragraph should be inserted stating that the debtor has twelve or fewer unsecured

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[359] 28 U.S.C. § 1472(1) (Supp. III 1979).

[360] 11 U.S.C. § 1121(b) (Supp. III 1979) gives the typical chapter 11 debtor at least 120 days in which to file a plan. If a trustee is appointed or cause is shown, the 120 day period will be shortened. *Id.* § 1121(c)(1)-(d).

The Code itself sets no time limit for filing a chapter 13 plan. *Id.* § 1321. R. BANKR. P. 13-201, however, provides that the plan must be filed within 10 days of the petition, with extensions granted for cause shown, on notice to other parties. Further, a delay in filing a plan is a ground for dismissal or conversion to chapter 7. 11 U.S.C. § 1307(c)(3) (Supp. III 1979).

[361] INTERIM R. BANKR. P. Form No. 2.

[362] *Id.* Form No. 9.

creditors.[363]

Paragraph four of the involuntary form requires the creditor or creditors filing the petition to state the grounds for involuntary relief. Only two of the old "acts of bankruptcy" remain and either will support the petition.[364] The petitioner or petitioners must allege either that the debtor is not paying his debts as they fall due or that the debtor has suffered the appointment of a receiver or similar custodian during the 120 days preceding the filing of the petition.[365]

Under rule 108,[366] a voluntary petition under chapter 7 may be filed without the accompanying documents if a list of creditors, complete with addresses, is attached to the petition. Nevertheless, the supporting documents must be filed within ten days of the voluntary petition, unless leave of court is granted.[367] An involuntary debtor is not required to file the supplementary documents until ten days after an order for relief is entered.[368]

A chapter 11 petition must be accompanied by a list of the names and addresses of the debtor's ten largest unsecured creditors.[369] This list is necessary so that the court may select and appoint an unsecured creditors' committee without delay.[370]

If this requirement is met, the debtor has fifteen days from

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[363] *See* 11 U.S.C. § 303(b)(2) (Supp. III 1979) (if less than 12 holders, any holder may initiate proceeding).

[364] *Id.* § 303(h)(1)-(2).

[365] *Id.; see* INTERIM R. BANKR. P. Form No. 9, ¶ 4 (two grounds of relief indicated).

[366] R. BANKR. P. 108.

[367] The court may grant 10 additional days as a matter of course, but can grant delays beyond the twentieth day only for cause shown. *Id.* 108(b).

[368] An order for relief will be entered unless the debtor controverts the involuntary petition. 11 U.S.C. § 303(h) (Supp. III 1979). If controverted, the petitioner(s) must show one of the two remaining justifications for involuntary bankruptcy. If that showing is acceptable, an order for relief will be entered. *Id.*

Once the order for relief is entered, the debtor has an obligation to file his schedule and statements. *Id.* § 521(1). R. BANKR. P. 108(b) provides the 10-day rule, with the same provisions for extension as in voluntary cases—an added 10 days with leave of court but no further extensions without cause shown, notice, and hearing. If the involuntary debtor fails to cooperate, the rule provides that "the court may order the . . . trustee, a petitioning creditor, or other party in interest to prepare and file any of these papers within such time as the Court shall fix." *Id.*

[369] INTERIM R. BANKR. P. 1007(a)(1).

[370] *See* 11 U.S.C. § 1102(a)(1) (Supp. III 1979) (court-appointed creditor committee).

the date of filing to tender the other materials, and extensions may be granted for cause shown after notice to other parties. The involuntary chapter 11 debtor also has fifteen days to file his documents, but the period does not begin to run until an order for relief is entered. Extensions may also be granted involuntary debtors for cause shown after notice to the other parties.[371]

The times for filing the statement in a chapter 13 case are the same as those for filing in chapter 7—within ten days of the petition, with the court empowered to grant an automatic ten-day extension, but no further extension without cause and notice.[372] As discussed below, the forms used in chapter 13 are somewhat different from those used in chapter 7 and chapter 11.[373] A specialized chapter 13 form is now generally available from legal stationers and should always be used to initiate chapter 13 cases.

2. The Statement of Affairs and the "Chapter 13 Statement"

The documents which must be filed to support the petition are as complex as the petition is simple. The statements of affairs are the most difficult of the supporting documents. There are three versions. In either a chapter 7 or a chapter 11 case, the Interim Rules of Bankruptcy Procedure contain two versions of the statement: Form No. 7, to be used by debtors not engaged in business, and Form No. 8, for business debtors.[374] Chapter 13 debtors must file a "Chapter 13 Statement," a version of Form No. 1-5, from the Rules of Bankruptcy Procedure (the "Chapter XIII Statement"), modified by the additional information required by rule 13001 of the Interim Rules of Bankruptcy Procedure. The "Chapter 13 Statement" includes the material normally included in the schedules of other debtors.[375]

These statements will require the close attention of the

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[371] INTERIM R. BANKR. P. 1007(b)-(d).

[372] R. BANKR. P. 13-107(b).

[373] *Compare* INTERIM R. BANKR. P. Form Nos. 7, 8 (chapter 7 or 11 forms) *with* R. BANKR. P. Form No. 13-5 ("Chapter 13 Statement") *and* INTERIM R. BANKR. P. 13001 (same).

[374] INTERIM R. BANKR. P. Form Nos. 7, 8.

[375] *See* note 373 *supra*.

debtor and his attorney. All require disclosure of the recent, and sometimes not-so-recent, financial history of the debtor. For example, he is required to provide personal and business financial information necessary to determine the dischargeability of various debts.[376]

Particular attention should be paid to the questions dealing with payments to creditors and transfers of property to creditors and others.[377] The trustee or debtor in possession will use this information to attach pre-bankruptcy transactions as preferential,[378] fraudulent,[379] or void as against the trustee.[380]

The "Chapter 13 Statement" contains questions similar to those posed by the statement in other cases and, in addition, requires the debtor to schedule his property.[381] A copy of the official form used in chapter XIII cases under the Bankruptcy Act, official Form No. 13-5, may be used if the additional information required by rule 13001 of the Interim Rules is added.[382] Rule 13001 requires that the old form be supplemented with a list of property which would be claimed as exempt if the debtor had filed under chapter 7.[383] Further, if the chapter 13 debtor is engaged in business, the debtor must file Form No. 8, the "Statement of Affairs" for business debtors.[384]

3. The Schedules

Chapter 7 and chapter 11 debtors must file Schedule A, listing debts owed by the debtor, and Schedule B, listing property owned by the debtor. These schedules are set forth as Form No. 6 of the Interim Rules.[385] Similar information must be provided

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[378] *See* INTERIM R. BANKR. P. Form No. 7, question 7 and Form 8, question 9 (prior bankruptcies). These questions are relevant to the six-year discharge period found in 11 U.S.C. § 727(a)(8) (Supp. III 1979). *See* note 133 *supra*.

[377] INTERIM R. BANKR. P. Form No. 7, questions 11, 12, 13 and Form No. 8, questions 13, 14, 16.

[378] 11 U.S.C. § 547 (Supp. III 1979).

[379] *Id.* § 548.

[380] *Id.* § 544.

[381] R. BANKR. P. Form No. 13-15.

[382] INTERIM R. BANKR. P. 13001(a).

[383] *Id.* Legal stationers now offer an integrated form.

[384] *Id.* 13001(b).

[385] *Id.* Form No. 6.

in the "Chapter 13 Statement."[386]

Attorneys should pay close attention to Schedules B-2 and B-4.[387] Specificity is required by most courts. Thus, where Schedule B-2(c) requires a list of "[h]ousehold goods, supplies and furnishings,"[388] the court and trustee will expect to find a complete list of major items such as appliances and a fairly complete breakdown of other items by groups (*e.g.*, linens, frozen foods, canned goods, *etc.*). Similar specificity is required in declaring exempt property in Schedule B-4.[389] Schedule B-4 also requires the debtor to list the statutory provision under which he claims the property to be exempt.[390]

A debtor filing in the Southern District of Mississippi must also, in Schedule B-4 and in the "Chapter 13 Statement," indicate any property claimed as exempt by the operation of section 522(f).[391]

4. Disclosure of Attorney's Fees

Section 329 of the Code requires the debtor's attorney to disclose any "compensation paid or agreed to be paid" to the attorney under any agreement entered into within one year of the filing.[392] Section 329 also authorizes the bankruptcy court to determine the reasonable value of the attorney's services and to order the repayment of excessive fees to the estate or debtor.[393] There is no official form used for this disclosure; most attorneys use a commercial form. The form must be filed with a chapter 7 or chapter 13 petition in the Southern District of Mississippi.[394] At the first meeting of creditors, the trustee or interim trustee is required to evaluate the attorney's work product in the context of the fees charged.[395]

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[386] *Id.* 13001; R. BANKR. P. Form No. 13-5.

[387] INTERIM R. BANKR. P. Form No. 6.

[388] *Id.* Form No. 6, Schedule B-2(c).

[389] *Id.* Form No. 6, Schedule B-4.

[390] *Id.*

[391] LOCAL R. BANKR. P., S.D. MISS., 4. See Appendix *infra* for such local rule.

[392] 11 U.S.C. § 329(a) (Supp. III 1979).

[393] *Id.* § 329(b). The bankruptcy courts are not reluctant to act in appropriate cases. *See In re* St. Pierre, 4 B.R. 184 (Bankr. Ct., D.R.I. 1980) (attorney's fee reduced).

[394] LOCAL R. BANKR. P., S.D. MISS., 5. See Appendix *infra* for such local rule.

[395] *Id.*

In chapter 11 cases filed in the Southern District, and in all cases filed in the Northern District, rule 219(b) of the Bankruptcy Rules controls, requiring the filing of the disclosure statement on or before the date set for the first meeting.[396] Judge Eaton, in local rule 5, has specified three factors to be used in evaluating the reasonableness of attorney's fees: "(A) All of the duties of the attorney have been performed pursuant to Local Rule No. 1; (B) All of the duties expected of a competent attorney have been performed; (C) Said compensation is commensurate with the quality of work demanded by this Court."[397] Judge Eaton's local rule 1, referred to above, contains an extensive list of duties which he expects the debtor's attorney to perform before or within a limited period after the date of the filing of the petition.[398] For example, the attorney must review the petition and forms to ensure that all are fully and correctly completed, that all exemptions are claimed, and that all creditors are properly listed.[399]

Bankruptcy Rule 219(c) also lists factors to be considered in determining the compensation to be allowed any attorney:

> (1) GENERAL . . . [T]he court shall give due consideration to the nature, extent, and value of the services rendered as well as to the conservation of the estate and the interests of creditors.
>
> . . . .
>
> (3) ATTORNEY OR ACCOUNTANT. Compensation may be allowed to an attorney or an accountant only for professional services.[400]

5. The Matrix List of Addresses

In order to simplify the task of sending notice to the various creditors and other parties in interest in the bankruptcy proceeding, bankruptcy courts now generally require that the documents filed include a special, separate list of creditors' ad-

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[396] *Id.*; R. BANKR. P. 219(b).

[397] LOCAL R. BANKR. P., S.D. MISS., 5. See Appendix *infra* for such local rule.

[398] *Id.* 1.

[399] *Id.* 1(1).

[400] R. BANKR. P. 219(c).

dresses, together with the address of the debtor's attorney.[401] The form used is called a matrix and is a simple grid of three inch blocks. Names and addresses are typed into blocks; this permits use of photocopy reproduction on sheets of peel-off address labels.

The matrix should always be filed with the petition. Where the petition is filed alone, without the schedules and statements,[402] the matrix form should be used to submit the required list of creditors, because this form is necessary for the court to give notice of the filing of the petition to the various creditors.

6. Special Forms and Duties

The Interim Rules and local rules (or practice) may impose special requirements upon the debtor and his counsel. These must always be consulted before filing. The Interim Rules, for example, require the chapter 11 debtor to file a list of his ten largest unsecured creditors as well as a complete list of all creditors, listed by class, and a complete list of all equity security holders.[403] The special requirements of the "Chapter 13 Statement" set forth in interim rule 13001 have already been discussed.[404]

Special duties are also required of the debtor in other cases. For example, where a partnership files bankruptcy, general partners not joining or not served must be notified of the petition within five days.[405] In addition, local practice in the Southern District of Mississippi requires the filing of a "Designation Form" in all cases. That form provides information concerning the nature and size of a case as well as the debtor's county of residence.

The local rules established for the Southern District also require that the debtor's attorney: (1) Review and determine the

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[401] LOCAL R. BANKR. P., S.D. MISS., 13(a). See Appendix *infra* for such local rule.

[402] R. BANKR. P. 108(b).

[403] INTERIM R. BANKR. P. 1007(a)-(b).

[404] *See* notes 374 through 383 and accompanying text *supra*.

[405] INTERIM R. BANKR. P. 1004(b) requires that notice be given by sending such general partner a copy of the petition by "first-class mail postage prepaid to [his] last known address." *Id.* For both voluntary and involuntary cases, this burden lies upon the party filing the petition.

accuracy of the petition, schedules, and statements;[406] (2) determine the name of the trustee and thereafter assist the trustee, particularly by providing books and records in appropriate cases;[407] (3) immediately initiate the redemption process, under section 722 of the Code, where the debtor so desires;[408] and (4) pursue and protest the debtor's interest in automobiles, as well as give notice to secured creditors of their rights in automobiles and other property.[409] Attorneys also are encouraged to initiate negotiations for reaffirmation agreements concerning automobiles prior to the first meeting of creditors.[410]

7. Place of Filing, Fees, Copies

The original petition should be filed with the appropriate bankruptcy clerk, in Jackson or Greenville, but both courts accept emergency petitions filed at other federal courthouses in their districts.[411] Abuse of this courtesy is not advised.

The fees required are: Chapter 7 or 13 (including individual and joint petitions), $60; chapter 9, $300; chapter 11 (non-railroad debtor), $200; chapter 11 (railroad debtor), $500.[412] Where the petition is filed by an individual, in either chapter 7, 11, or 13, payments may be made in installments.[413]

The number of copies required varies between the districts, and local rules must always be consulted. For either voluntary or

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[406] LOCAL R. BANKR. P., S.D. MISS., 1(1). See Appendix *infra* for such local rule.

[407] *Id.* 1(2)-(3).

[408] *Id.* 1(3)-(5), (10).

[409] *Id.* 1(7)-(9).

[410] *Id.* 2.

[411] LOCAL R. BANKR. P., N.D. MISS., 5. See Appendix, *infra* for such local rule. A similar practice is followed in the Southern District. *See* Joint Announcement by Judge Barney Eaton, III, Bankruptcy Judge for the Southern District of Mississippi, and Harvey G. Henderson, United States Clerk for the Southern District of Mississippi, dated September 20, 1979. See Appendix *infra*.

Both judges have indicated that an emergency petition is one filed to forestall a pending foreclosure, garnishment, attachment, or the like.

[412] 28 U.S.C. § 1930(a) (Supp. III 1979).

[413] *Id.*; INTERIM R. BANKR. P. 1006(b). Local Southern District rules modify this procedure, permitting no more than five installments of $15.00 each. INSTRUCTION FOR PROPERLY FILING PETITIONS, S.D. MISS., No. 4. LOCAL R. BANKR. P., S.D. MISS., 7 provides a special chapter 13 payment procedure, whereby chapter 13 fees not paid at filing will be automatically treated in the chapter 13 plan. *Id.* See Appendix *infra*.

involuntary cases, the interim rules adopted by the Northern District require an original petition and three copies for chapter 7 or 13 and eleven copies for chapters 9 or 11.[414] In the Southern District, Judge Eaton requires an original and two copies of a voluntary chapter 7; he requires the original and five copies in chapters 9 and 11.[415] In chapter 13 cases, the original and two copies of the petition must be filed together with enough copies of the summarized plan to mail a copy to each creditor.[416]

8. Service and Answers in Involuntary Cases

Following the filing of an involuntary petition, the clerk of the bankruptcy court issues a summons for service.[417] Service is made as required by the Federal Rules of Civil Procedure and may be made by any person over eighteen who is not a party.[418] Service must generally be made within ten days of the issuance of the summons.[419]

The answer to an involuntary petition must be filed within twenty days, as provided by rule 12 of the Federal Rules of Civil Procedure, unless the time for answer is shortened by the court.[420]

IV. From Filing to the First Meeting of Creditors

For a time following the filing of the petition, there is little for the voluntary debtor and his attorney to do. It is during this period that creditors will be given notice, a trustee will be selected, and, in a few cases, a creditors' committee elected. The active, litigious, and all too often acrimonious phase of the case begins at or after the first meeting of creditors—the point at which this article stops. In a few cases, however, the trustee may

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[414] Interim R. Bankr. P. 1002(b)(1)-(2), 1003(a).

[415] Instructions, *supra* note 413, No. 14. See Appendix *infra* for such instruction. The instruction makes no distinction between the copies required for voluntary and involuntary petitions.

[416] Local R. Bankr. P., S.D. Miss., 13. See Appendix *infra* for such local rule.

[417] R. Bankr. P. 111.

[418] *Id.* 704(b). Where service by mail is required, see *id.* 111, 704(c).

[419] *Id.* 704(e).

[420] *Id.* 112; Interim R. Bankr. P. 1009(b). *See generally* Fed. R. Civ. P. 12 (governs answer filing procedure).

decide to act or creditors may initiate adversary proceedings before that first meeting. On the other hand, in an involuntary case, this is a very busy period.

A. Appointment of Trustees

1. Voluntary Cases

When a voluntary petition is filed under either chapter 7 or 13, the court will appoint a trustee to take charge of the debtor's assets—the estate[421]—and proceed with the case. In a chapter 7 case, the court appoints an interim trustee,[422] who serves until replaced by a trustee elected by the creditors.[423] In most chapter 7 cases, creditors do not request the election, as required,[424] and the interim trustee serves throughout the case. Where creditors do decide to elect their own trustee, the election usually takes place at or after the first meeting of creditors.

Where chapter 7 creditors elect their own trustee, the election is governed by section 702. Only unsecured creditors with "allowable, undisputed, fixed [and] liquidated" claims entitled to distribution may vote.[425] Even claimants meeting these qualifications are barred if they are insiders or if the claim asserted is "materially adverse . . . to the interest of creditors entitled to

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[421] *See* notes 228 through 248 and accompanying text *supra*.

[422] 11 U.S.C. § 701(a) (Supp. III 1979). The court is required to appoint a disinterested person to serve as interim trustee. The appointment must follow the entry of an order for relief. The interim trustee must be selected from the panel of private trustees created by 28 U.S.C. § 604(f) (Supp. III 1979):

> For each bankruptcy court, the Director [of the Administrative Office of the United States Courts] shall name qualified persons to membership on the panel of trustees. The number and qualifications of persons named to membership on the panel of trustees shall be determined by rules and regulations to be adopted by the Director. An individual named to membership on the panel of trustees shall have a residency or office in the State served by the court or in any adjacent State. A corporation named to membership on the panel of trustees shall be authorized by its charter or by law to act as trustee and shall have an office in the State served by the court. The Director on his own initiative may at any time remove for cause a person named to a panel of trustees or remove a trustee appointed from the panel.

[423] 11 U.S.C. § 702(b) (Supp. III 1979). Creditors usually elect a trustee in the larger cases only.

[424] *Id.* § 702(b).

[425] *Id.* § 702(a)(1).

. . . distribution."[426] Those desiring to vote must have filed a proof of their claim prior to the meeting.[427] "[C]reditors holding at least 20 percent in amount" and otherwise qualifed to participate must vote in the election for trustee.[428] For a candidate to be elected, he must receive a majority of the vote, calculated in amount of the claims represented.[429] Otherwise, the interim trustee continues to serve.[430]

There is no election of the trustee in a chapter 13 case. Rather, the trustee is appointed by the bankruptcy court under section 1302, which also describes the chapter 13 trustee's duties in some detail.[431] Where the caseload warrants, a standing trustee for all chapter 13 cases is usually appointed.[432]

The Code presumes that no trustee will be appointed in chapter 11 cases unless there is a compelling need. Section 1104 provides that any party in interest may move for the appointment: "(1) for cause, including fraud, dishonesty, incompetence or gross mismanagement . . . or (2) [i]f such appointment is in the best interest of creditors, . . . equity security holders, and other interests of the estate."[433] If the movant cannot justify the appointment of a trustee, the Code provides a less drastic remedy—the appointment of an examiner "to conduct such investi-

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[426] *Id.* § 702(a)(2)-(3). *See* notes 199 through 201 and accompanying text *supra.*

[427] INTERIM R. BANKR. P. 2003(b)(3).

[428] 11 U.S.C. § 702(c)(1) (Supp. III 1979).

[429] *Id.* § 702(c)(2).

[430] *Id.* § 702(d).

[431] *Id.* § 1302(a). Section 1302(b)-(c) sets forth the duties of the trustee:

(b) The trustee shall—

(1) perform the duties specified in sections 704(2), 704(3), 704(4), 704(5), 704(6), and 704(8) of this title;

(2) appear and be heard at any hearing that concerns—

(A) the value of property subject to lien;

(B) confirmation of a plan; or

(C) modification of the plan after confirmation; and

(3) advise, other than on legal matters, and assist the debtor in performance under the plan.

(c) If the debtor is engaged in business, then in addition to the duties specified in subsection (b) of this section, the trustee shall perform the duties specified in sections 1106(a)(3) and 1106(a)(4) of this title.

[432] *Id.* § 1302(d)-(e).

[433] *Id.* § 1104(a).

gation of the debtor as is appropriate."[434]

The institution of "receiver" has disappeared from the Code. The Code specifically provides that "a bankruptcy court may not appoint a receiver in a case under" Title 11.[435] According to the Senate Report: "The bankruptcy code has ample provision for the appointment of a trustee when needed. Appointment of a receiver would simply circumvent the established process."[436]

2. Involuntary Cases

In involuntary proceedings under chapter 7, an interim trustee may be appointed before entry of the order for relief. The moving party must show that the appointment is "necessary to preserve the property of the estate or to prevent loss to the estate."[437] Appointment of a trustee in an involuntary chapter 11 proceeding will occur where a need is shown, as in a voluntary case.[438]

3. Limitations on the Bankruptcy Court's Power to Appoint Trustees

All court-appointed trustees must be approved by the Office of the Director of the Administrative Office of the United States Courts.[439] Further, rule 2005(a) of the Interim Rules requires the Bankruptcy Court to limit appointments, stating that "[a]ppointments of trustees and examiners shall be made so that the annual aggregate compensation of any person shall not be disproportionate or excessive, giving proper regard to geographi-

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[434] *Id.* § 1104(b). *See generally id.* § 1106(b) (listing examiner's duties). Among the more significant changes under the Code is § 1109, which stills the voice of the Securities Exchange Commission in bankruptcy cases. The SEC no longer has standing to intervene in bankruptcy cases. *See generally* 5 W. COLLIER, *supra* note 97, ¶ 1109.01 (SEC's role under the Code); Corroto & Picard, *Business Reorganization Under the Bankrutpcy Reform Act of 1978—A New Approach to Investor Protections and the Role of the S.E.C.*, 28 DEPAUL L. REV. 961, 964 (1979) (same).

[435] 11 U.S.C. § 105(b) (Supp. III 1979).

[436] S. REP., *supra* note 106, at 29; *accord* H.R. REP., *supra* note 17, at 316.

[437] 11 U.S.C. § 303(g) (Supp. III 1979); INTERIM R. BANKR. P. 2001. LOCAL R. BANKR. P., N.D. MISS., 7, modifies interim rule 2001. See Appendix *infra* for such local rule.

[438] *See* text accompanying note 433 *supra* (trustee appointment under chapter 11).

[439] *See* note 422 *supra* (trustee appointment under chapter 7).

cal constraints."[440]

Together, the statute and rule changes are designed to end cronyism and the "Bankruptcy Ring" described by Congress:

> There is an unusually close relationship between the bankruptcy judges and the bankruptcy bar, especially the debtors' and trustees' bars. They are in frequent contact with the judge as a result of the necessity for the judge's review of the administrative actions of the trustee or debtor in possession. Usually, a trustee is appointed by the bankruptcy judge, and is appointed in numerous cases before the same judge. Debtors' attorneys make frequent appearances in the same court representing numerous different debtors. All of these contacts and relationships have led to a feeling among nonbankruptcy practitioners that there is a "bankruptcy ring" that has an inside track on all bankruptcy matters, including the judges' favoritism . . . .[441]

B. Duties of the Debtor, His Attorney, and His Creditors Prior to the First Meeting of Creditors; Proceedings In Involuntary Cases

The local bankruptcy rules in the Southern District of Mississippi require the debtor, his attorney, and any creditors involved to accomplish a great many tasks prior to the first meeting. Rule 1 requires that the attorney for the debtor determine the name of the trustee appointed, and thereafter assist the trustee, such as by delivering any books and records of the debtor to the trustee.[442] Local rule 1 requires the attorney and the debtor to determine what property the debtor may desire to redeem under section 722.[443] Rule 2 requires the debtor desiring to reassume automobile loans to be prepared to do so at the first meeting.[444]

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[440] INTERIM R. BANKR. P. 2005(a). The rule is not applicable to standing chapter 13 trustees. Separate statutory provision is made at 11 U.S.C. § 1302(e) (Supp. III 1979) for their renumeration.

[441] H.R. REP., *supra* note 17, at 95.

[442] LOCAL R. BANKR. P., S.D. MISS., 1(2)-(3). See Appendix *infra* for such local rule.

[443] *Id.* 1(4)-(11). See Appendix *infra* for such local rule. *See* notes 254, 255 and accompanying text *supra*.

[444] LOCAL R. BANKR. P., S.D. MISS., 2. See Appendix *infra* for such local rule.

Creditors in the Southern District are required to be prepared to file for abandonment under section 554 by the first meeting.[445] The procedure for requesting abandonment is somewhat different in the Northern District.[446] Also, during this period a debtor who has been subjected to an involuntary filing and who elects to controvert the involuntary petition will have his status adjudicated by the court. The procedures are set forth at section 303.[447] The petitioning creditor must show that "(1) the debtor is generally not paying [his] debts as such debts become due; or (2) within 120 days before the date of the filing of the [involuntary] petition, a custodian . . . was appointed or took possession [of debtor's assets]."[448] The debtor and petitioning creditor or creditors are not entitled to a jury trial in controverted involuntary cases.[449]

C. Creditors' and Other Committees

The Code provides for committees of creditors in both chapter 7 and 11, but not in chapter 13. The chapter 7 creditors' committee may be elected by the same creditors who are permitted to vote for the trustee.[450] The committee will consist of at least three and not more than eleven unsecured creditors.[451] It is empowered to consult with and make recommendations to the trustee concerning the performance of his duties "and submit to the court any question affecting the administration of the estate."[452] The chapter 7 creditors elect their committee at the first meeting.[453]

The chapter 11 creditors' committee, on the other hand, is to be appointed by the court "as soon as practical after the order for relief" is entered.[454] Again, the committee represents un-

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[445] *Id.* 3. See Appendix *infra* for such local rule.

[446] LOCAL R. BANKR. P., N.D. MISS., Procedures For Secured Creditors. See Appendix *infra.*

[447] 11 U.S.C. § 303 (Supp. III 1979).

[448] *Id.* § 303(h).

[449] 28 U.S.C. § 1480(b) (Supp. III 1979).

[450] 11 U.S.C. § 702 (Supp. III 1979).

[451] *Id.* § 705(a).

[452] *Id.* § 705(b).

[453] *Id.* § 705(a).

[454] *Id.* § 1102(a)(1).

secured creditors. The Code uses the term "shall appoint," indicating that this appointment is mandatory.[455] The committee is appointed from the seven largest creditors willing to serve.[456] The chapter 11 court may also appoint a committee to represent equity security holders and other creditor groups, such as secured creditors, in appropriate cases.[457]

Chapter 11 committees are granted significant powers,[458] including the power to retain attorneys, accountants, and other agents.[459] Not all qualified creditors may serve on a chapter 11

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[455] *Id.*

[456] *Id.* § 1102(b)(1). The names of these creditors will appear on the list of the 10 largest unsecured creditors, which must be submitted with a chapter 11 petition. *See* text accompanying note 369 *supra.*

[457] 11 U.S.C. § 1102(a)(2) (Supp. III 1979).

[458] 11 U.S.C. § 1103(c) states that:

> A committee appointed under section 1102 of this title may—
>
> (1) consult with the trustee or debtor in possession concerning the administration of the case;
>
> (2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
>
> (3) participate in the formulation of a plan, advise those represented by such committee of such committee's recommendations as to any plan formulated, and collect and file with the court acceptances of a plan;
>
> (4) request the appointment of a trustee or examiner under section 1104 of this title, if a trustee or examiner, as the case may be, has not previously been appointed under this chapter in the case; and
>
> (5) perform such other services as are in the interest of those represented.

[459] *Id.* § 1103(a). Further, 11 U.S.C. § 1103(b) provides that "[a] person employed to represent a committee under section 1102 . . . may not, while employed by such committee, represent any other entity in connection with the case."

Once again congressional concern with the "Bankruptcy Ring" is expressed in a Code provision:

> In order to discourage the practices surrounding election of creditors' committees today and to avoid a serious potential for conflict of interest, the bill requires that the counsel to the creditors' committee cease any representation of creditors in their individual capacities in connection with the case. Under present practice, the attorney with the most proxies can usually have himself retained as counsel for a creditors' committee. The practice presents an enormous potential for conflict of interest. If the creditors on a committee split in a vote, the attorney for a particular creditor on the committee may be required to represent both the committee's position and his creditor-client's position, which may be directly contrary to the committee's position. Under this bill,

committee. Although any creditor may serve on a chapter 7 committee,[460] only creditors who are "persons" under the Bankruptcy Code may serve on a chapter 11 committee.[461] Since the term "person" excludes trusts, estates, and governmental units,[462] those entities are excluded from the chapter 11 creditors committee.[463]

D. The Meeting of Creditors

Section 341 provides that the first meeting of creditors shall be held "[w]ithin a reasonable time after the order for relief."[464] Interim rule 2003 requires that the meeting be held, in all cases, not less than twenty days and not more than forty days after the order for relief.[465] Notice must be given of the meeting[466] and the creditors' meeting in a chapter 11 case may not be held without "at least 20 days notice by mail."[467]

The debtor is required to appear at the first meeting and must submit to examination under oath.[468] Although any creditor or trustee may examine the debtor, the debtor's attorney generally asks the debtor a series of questions similar to the ones below:

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where more diverse interests may be represented on committees than under current law, the conflict is more likely to arise. Thus, the bill requires that an attorney for a creditors' committee cease representation of creditors in connection with the case. It does not require the attorney to cease representation of the creditors in matters unrelated to the case. It merely sets out a mandatory anti-conflict of interest rule for each case.

H.R. REP., *supra* note 17, at 104-05.

[460] 11 U.S.C. § 702, 705 (Supp. III 1979).

[461] *Id.* § 1102(b)(1).

[462] *Id.* § 101(30); *see* text accompanying note 103 *supra*.

[463] *See, e.g., In re* American Atomics Corp., 2 B.R. 526, 527 (Bankr. Ct., D. Ariz. 1980) (school district not a person); *In re* Old Second Nat'l Bank, 7 B.R. 37, 39 (Bankr. Ct., N.D. Ill. 1980) (land trust not a person). *See also* H.R. REP., *supra* note 17, at 313 (estate or trust not person).

[464] 11 U.S.C. § 341(a) (Supp. III 1979).

[465] INTERIM R. BANKR. P. 2003(a).

[466] 11 U.S.C. § 342 (Supp. III 1979).

[467] INTERIM R. BANKR. P. 2002(b).

[468] 11 U.S.C. § 343 (Supp. III 1979). Further, § 344 provides immunity from prosecution to force testimony which would otherwise be protected by the privilege against self-incrimination.

Standard Questions to be Addressed To The Debtor in a Chapter 7 Case[469]

1. Please state your name and the address at which you reside.
2. What is your age?
3. Have you been known by any other name or done business under any other name during the past six years?
4. Are you the petitioner in this bankruptcy proceeding?
5. Have you resided in the Nothern/Southern District of Mississippi for more than six months prior to filing this bankruptcy petition.?
6. Are you employed?
   a. Where?
   b. What is your job title?
   c. How frequently do you get paid?
   d. What is your "take-home pay"?
7. Have you ever filed bankruptcy before?
   a. If so, when?
8. Do you understand that if you are granted a discharge in this bankruptcy proceeding you cannot file a bankruptcy proceeding again for six (6) years? [Does not apply in chapter 13 cases.]
9. Have you read the petition in this case and all the statements and schedules attached to it?
   a. Did you sign the petition?
   b. Are the facts and statements contained in the petition and supporting documents true and correct to the best of your knowledge?
   c. Do you still desire to file bankruptcy?

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[469] This set of questions is a slightly modified version of one prepared and used by the attorneys of North Mississippi Rural Legal Services, Oxford, Mississippi.

10. Do you own any jewelry other than that listed in the documents filed with the petition?

11. Do you own any property or have any interest in any property of any kind that is not listed in your schedules?

12. Have you filed your federal and state income tax returns for the year?
    a. Have you received a tax refund this year?
    b. When did you receive that refund?
    c. Do you still have the money?

13. Do you expect to inherit any property from a deceased person or receive any property from a former spouse during the next 180 days?
    Do you understand that, should you inherit any property or receive any property from a former spouse during the next 180 days, you must report that event to the trustee or your discharge may be questioned?

14. Other than those transactions listed and described in your petition and schedules:
    a. Have you by gift or sale, transferred any property to any person within the year preceeding the filing of this petition?
    b. Has any of your property been repossessed by any creditor during the ninety days prior to the date of the filing of the petition in this case?
    c. Have you suffered a garnishment during that period?
    d. Have you made any payments to creditors during the ninety days prior to the filing of the petition herein?

15. Are you presently a party to any judicial proceeding?

16. What exemptions have you elected to use—the federal exemptions or those permitted by Mississippi law?

17. Have you or do you plan to reaffirm any debt(s)? If so, please describe the debt, name the creditor, and explain the circumstances.

18. [For chapter 11 or 13 debtors] Have you submitted (when do you propose to submit) a plan?

This list is certainly neither exhaustive nor mandatory, and questions should be added or deleted as necessary. Chapter 11 or 13 cases in which the debtor intends to continue the business would require many more questions concerning the nature of the business, the debtor's plans, or new sources of capital.

The bankruptcy judge is not permitted to preside at or even attend the first meeting.[470] This provision is designed to remove the bankruptcy judge from "situations where he will hear evidence outside of the context of a dispute that he must decide" at a later date.[471] The bankruptcy clerk normally presides at the first meeting.[472] He is responsible for recording the proceeding by "[e]lectronic sound recording equipment."[473]

Since the judge is not present at the first meeting, disputes over testimony or evidence and like matters cannot be resolved. This means that little of great consequence can occur at the first meeting. Matters that are disputed must be taken up at a later time.

V. Conclusion

In the first paragraph of this article, reference was made to the dramatic increase in the number of bankruptcies filed. Most of these cases are so-called "personal bankruptcies," involving individuals. The individuals who file those proceedings, as well as the creditors drawn into the case, deserve adequate representation, just as do business debtors involved in large-scale proceedings. Unfortunately, attorneys who represent these individuals before the bankruptcy court cannot always provide such representation. Frequently the attorney involved has been per-

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[470] 11 U.S.C. § 341(c) (Supp. III 1979).
[471] H.R. Rep., *supra* note 17, at 331.
[472] Interim R. Bankr. P. 2003(b)(1).
[473] *Id.* 2003(c).

suaded to appear on behalf of a client or friend who might otherwise not be able to secure representation—for bankruptcy specialists, like other professional specialists, tend to be expensive. It is hoped that this article, and others like it,[474] will do something to remedy this problem by introducing the Bankruptcy Code to the non-specialist who finds himself contemplating an appearance in bankruptcy court.

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[474] Some suggested articles include: Aaron, *The Bankruptcy Reform Act of 1978: The Full Employment for Lawyers Bill* (pts. 1-3), 1979 UTAH L. REV. 1, 175, 405; (pt. 4), 1980 UTAH L. REV. 19; Ahart, *Obtaining Reaffirmation of Individual Debts Under the New Bankruptcy Code*, 97 BANKING L.J. 153 (1980); DeWoskin, *A Warning to Attorneys: Reaffirmation Under the New Bankruptcy Code*, 85 COM. L.J. 296 (1980); Hanley, *Partnership Bankruptcy Under the New Act*, 31 HASTINGS L.J. 149 (1979); Kaplan, *Chapter 13 of the Bankruptcy Reform Act of 1978: An Attractive Alternative*, 28 DEPAUL L. REV. 1045 (1979); Kennedy, *The Bankruptcy Court Under the New Bankruptcy Law: Its Structure, Jurisdiction, Venue, and Procedure*, 11 ST. MARY'S L.J. 251 (1979); King, *Chapter 11 of the 1978 Bankruptcy Code*, 53 AM. BANKR. L.J. 107 (1979); Rendleman, *Liquidation Bankruptcy Under the '78 Code*, 21 WM. & MARY L. REV. 575 (1980); Silberman, *Rehabilitation and Reorganization Under the New Bankruptcy Code*, 41 ALA. LAW. 133 (1980); Weistraub & Resnick, *Involuntary Petitions Under the New Bankruptcy Code*, 97 BANKING L.J. 292 (1980); *Some Comments About the Rules of Bankruptcy Procedure Under the Bankruptcy Reform Act* (transcript), 85 COM. L.J. 125 (1980).

This list is not by any means complete nor does it include articles of a highly specialized or technical nature.

APPENDIX: LOCAL RULES OF PROCEDURE PAGE

(1) Local Rules of Bankruptcy Procedure, Northern District of Mississippi 718
(2) Procedures for Secured Creditors—Bankruptcy Court, Northern District of Mississippi 727
(3) Local Rules of Bankruptcy Procedure, Southern District of Mississippi 729
(4) Joint Statement by Barney L. Eaton, III, Bankruptcy Judge for the Southern District of Mississippi, and Harvey G. Henderson, United States Clerk for the Southern District of Mississippi, dated September 20, 1979 738
(5) Instructions for Properly Filing Petitions, Bankruptcy Court, Southern District of Mississippi 740

United States Bankruptcy Court
Northern District of Mississippi
P.O. Box 1800—344 May Bldg.
Greenville, Mississippi 38701

October 1, 1979

Re: Local Rules

TO ALL MEMBERS OF THE BAR:

Attached hereto are our new Local Rules. Your immediate and careful attention is directed to Local Rule Six, specifying how lists of creditors must be prepared, and to Local Rule Five dealing with the place where petitions must be filed.

The Rules of Bankruptcy Procedure in effect on September 30, 1979 will continue to apply to cases commenced under Title 11 after that date, except to the extent that they are inconsistent with any provision of the Bankruptcy Reform Act of 1978. The Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States is working on the preparation of Rules to replace the present Rules, but we are informed that final adoption of permanent new rules is some two years off.

Not all procedural matters are covered in the new Code. To fill the gap, the Advisory Committee has distributed a set of Interim Bankruptcy Rules and Forms and has suggested that the Bankruptcy Court in each district adopt them as local rules. This court has reviewed the Interim Rules and, with the approval of our two District Judges, has adopted 35 of them, without modification, as Local Rules for this district. The 8 other Interim Rules have been adopted with modifications. In addition, a few additional rules have also been adopted.

It will not be practicable for the court to furnish attorneys with copies of the "Interim Bankruptcy Rules and Forms" in the form in which they were adopted by the Advisory Committee. In order to understand our Local Rules, it will be necessary for attorneys to provide themselves with copies of the Interim Rules and Forms.

Matthew Bender has published the Interim Rules and Forms in pamphlet form and has distributed them to subscribers to Collier On Bankruptcy. For those of you who are not Collier subscribers, copies of the "Interim Bankruptcy Rules and Forms" may be obtained, at a cost of $3.00 per copy, from Commerce Clearing House, Inc., 4025 W. Peterson Ave., Chicago, IL 60646.

/s/RUTH M. WHITT, CLERK

LOCAL RULES OF BANKRUPTCY PROCEDURE

NORTHERN DISTRICT OF MISSISSIPPI

LOCAL RULE ONE

Definitions

The definitions of words and phrases in Title 11 and the rules of construction in § 102 of Title 11 govern their use in these rules, except where the context of the rule clearly indicates otherwise. In addition, the following words and phrases used in these rules have the meanings herein indicated unless they are inconsistent with the context:

(1) "Address", where an address is required by the Code, by the Rules of Bankruptcy Procedure, an Interim Rule or by these local rules shall include post office box, or rural route and box number, or house and apartment number and street or avenue; the city or town; state and zip code. A foreign address shall include corresponding data, plus the name of the foreign country.

(2) "Attorney" includes a firm of attorneys.

(3) "Bankruptcy Code" or "Code" mean [*sic*] Title 11 of the United States Code.

(4) "Bankruptcy Rule _____" refers to one of the "Rules of Bankruptcy Procedure" adopted by the Supreme Court of the United States and in effect on September 30, 1979, to the extent that such rule is not in conflict with nor inconsistent with any of the provisions of the Bankruptcy Code, or of Public Law 95-598.

(5) "Clerk" means the clerk of the United States Bankruptcy Court for the Northern District of Mississippi.

(6) The unmodified word "court" and "this court" mean the United States Bankruptcy Court for the Northern District of Mississippi.

(7) "District Court" means the United States District Court for the Northern District of Mississippi.

(8) "Firm" means a partnership or professional corporation enagaged in the practice of law.

(9) "Form(s) _____" refers to one or more of the forms appended to the Interim Rules.

(10) "Interim Rule(s) _____" refers to one or more of the Interim Bankruptcy Rules suggested by the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States as guidelines for the adoption of local rules by bankruptcy courts.

(11) "Title 11" means Title 11 of the United States Code.

(12) "Trustee" includes interim trustee and debtor in possession.

LOCAL RULE TWO

Adoption of Certain Interim Rules

Interim Rules 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 2002, 2005,

2006, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 4003, 5001, 6001, 7001, 7002, 7003, 7004, 8001, 8002, 8003, 8004, 8005, 8006, 8007, and 13001 are hereby adopted without modification as Local Rules of this court. Each such rule may be cited as "Interim Rule _____".

Local Rule Three

Adoption of Official Forms

Forms 1 through 25 are hereby adopted, without modification, as official forms to be used in cases and proceedings pending in this court. Said forms may be adapted to conform to the circumstances of the particular case or proceeding in which they are being used.

Local Rule Four

Adoption of Modified Interim Rule 1001

Interim Rule 1001 is modified by deleting therefrom subdivision (b) thereof. As so modified said Interim Rule is adopted as a local rule of this court and may be cited as "Modified Interim Rule 1001."

Note: This Rule adopts subdivision (a) of Interim Rule 1001 as a local rule. Subdivision (b) has been deleted because its material has been included in Local Rule One.

Local Rule Five

Place of Filing Petition

A petition commencing a case under Title 11 shall be filed in the office of the clerk of this court; except, that where circumstances require immediate filing so as to forestall a judicial sale or foreclosure sale of any of debtor's property, or other like emergency, the petition may be carried by hand to the office of the clerk of the district court at Aberdeen, Clarksdale or Oxford, Mississippi and there tendered for filing; and the clerk of the district court and his deputies are hereby appointed deputy clerks of this court for the purpose of filing such petitions. The clerk of the district court shall immediately notify the clerk of this court of such filing by telephone, and shall obtain from the clerk of this court a file number for the case so filed, and shall forthwith transmit the petition so filed, with any accompanying papers, to the clerk of this court.

Local Rule Six

List of Creditors; Matrix

When filing a voluntary petition with the clerk of the United States Bankruptcy Court, four complete sets of debtor's petition, schedules or Chapter 13

Statement and Statement of Affairs must be filed. THE DEBTOR'S ATTORNEY must also prepare and present ONE MASTER ADDRESS LIST, using forms which may be obtained from the Bankruptcy Clerk.

IT IS IMPORTANT THAT ONLY THE PRESCRIBED FORM BE USED, and that the instructions for its use be carefully followed. The overall size of the form and address blocks thereon are especially designed for equipment used by the Bankruptcy Court. This system will provide improved service to debtors and will expedite the mailing of notices to creditors. THE NAME AND COMPLETE MAILING ADDRESS, INCLUDING ZIP CODE, must be furnished for all creditors and be listed in the same order as they are listed in Schedules A-1, A-2 and A-3, and should include the name and address of cosigners of any debt. Use the first two boxes for names and addresses of the debtor and the debtor's attorney. DO NOT TYPE ON THE MASTER ADDRESS FORM, but use it as a guide behind a sheet of bond paper the same size. Be sure the ENTIRE ADDRESS IS WITHIN THE ADDRESS BLOCK. ONLY ONE NAME AND ADDRESS PER BLOCK.

LOCAL RULE SEVEN

Interim Trustee in Involuntary Liquidation Cases

Interim Rule 2001 is modified in the following respects:

(1) Subdivision (a) is deleted.

(2) Subdivision (c) is modified so as to read as follows:

> "*Bond of Applicant.* As a condition to granting an application of the kind mentioned in subdivision (b) of this rule the court may require the applicant to furnish a bond in an amount and with such surety as the court shall specify, conditioned to indemnify the debtor for the costs, attorney's fee, expenses and damages allowable under § 303(i) of the Code. On application of the debtor and on notice to party or parties who procured the appointment of the interim trustee, the court may increase the amount of the bond."

(3) Subdivision (d) is modified so as to read as follows:

> "*Order of Appointment.* An order appointing an interim trustee under this rule shall state why the appointment is necessary. A certified copy of the order shall forthwith be delivered to the debtor by the applicant, or mailed to him at his last known address, and a copy shall also be delivered to such other persons, if any, as the court may designate."

(4) Subdivision (e) is modified so as to read as follows:

> "*Turnover and Report.* After qualification of a trustee elected under § 702 of the Code, or on approval by the court of a bond filed by the debtor pursuant to the second sentence of § 303(g) of the Code, the

interim trustee shall, unless the court orders otherwise, forthwith turn over to such elected trustee or to the debtor, as the case may be, all the records and property of the estate in his actual possession or subject to his control as interim trustee and shall within 30 days thereafter file his final report and account. The debtor or trustee shall permit the interim trustee to have such access to the records turned over by him as may be necessary for the proper preparation of such final report and account."

As so modified, said Interim Rule is adopted as a local rule of this court and may be cited as "Modified Interim Rule 2001."

Local Rule Eight

Meeting of Creditors or Equity Security Holders

Interim Rule 2003 is modified in the following respects:

(1) The first sentence of subdivision (a) is modified so as to read as follows:

"The court shall call a meeting of creditors to be held not less than 20 nor more than 50 days after the order for relief; except that in a Chapter 7 case the meeting may be held earlier, but not less than 10 days after the order for relief."

(2) Subparagraph (1) of subdivision (b) is modified so as to read as follows:

"(1) *Meeting of creditors.* The clerk, or a deputy clerk, shall preside at the meeting of creditors. The business of the meeting shall include the examination of the debtor and, in a Chapter 7 case, if the election of a trustee or of a creditors' committee is requested by creditors entitled by subsection (b) of § 702 of Title 11 to request such an election, it shall include the election of a trustee or of a creditors' committee. When a trustee is elected the creditors may recommend the amount of the trustee's bond to be fixed by the court."

(3) The second sentence of subparagraph (3) of subdivision (b) is modified so as to read as follows:

"Notwithstanding objection to the amount of allowability of a claim for the purpose of voting, the presiding clerk or deputy clerk shall tally said vote in the amount claimed by the claimant and shall report the result of the election that would obtain with both the lower and higher of the disputed amounts."

(4) Subdivision (c) of said Rule is modified so as to add the following sentence:

"However, the court may in any case, in its discretion, direct that a meeting of creditors or equity security holders be recorded by a court

reporter."

(5) The second sentence of subdivision (d) of said Rule is modified by inserting, after the word "disputed," the following words: "or if there is a dispute as to whether or not creditors in the required number and amount had requested the election of a trustee."

(6) By adding to such Rule an additional subdivision, to be designated as subdivision (e) which shall read as follows:

> "(e) *Dispute Other Than Election; Report to Court.* If a dispute other than one concerning an election arises at a meeting of creditors or equity security holders and if the dispute is one which only the court can resolve, the presiding clerk or deputy clerk, if requested during the meeting so to do by the debtor, the trustee, a creditor or other interested party, shall, promptly after the meeting, inform the court in writing of the dispute."

(7) By adding to such Rule an additional subdivision, to be designated as subdivision (f), which shall read as follows:

> "(f) *Action by Presiding Clerk.* The clerk or deputy clerk presiding shall have power (1) to declare a meeting terminated; (2) to regulate the order in which the trustee and creditors may examine the debtor; (3) to limit the length of the examination by any person; (4) to continue or adjourn a meeting to a specified time; (5) to take a recess; (6) to ask the debtor one or more questions for purposes of clarification. Any conduct which has the effect of interfering with the orderly conduct of the meeting by the clerk or deputy clerk presiding thereat, may be punished as a contempt of court."

As so modified, Interim Rule 2003 is adopted as a local rule of this Court and may be cited as Modified Interim Rule 2003.

LOCAL RULE NINE

Notice to Trustee of Selection

Interim Rule 2004 is modified by adding at the end thereof the following:

> "An interim trustee appointed pursuant to § 701(a) or § 303(g) of the Bankruptcy Code shall, with his bond or other notification of acceptance, file in the clerk's office a certificate, signed by him, stating that he is a disinterested person as defined in § 101 of the Bankruptcy Code. Such an interim trustee who, on notification of his appointment, knows that he is not a disinterested person, shall immediately notify the clerk of that fact by telephone."

As so modified said Interim Rule is adopted as a local rule of this Court

and may be cited as Modified Interim Rule 2004.

Local Rule Ten

Relief from Automatic Stay

Subdivision (a) of Interim Rule 4001 is modified so as to read as follows:

"(a) *Final Hearing.* The stay of any act against property of the estate under § 362(a) of the Bankruptcy Code expires 60 days after a final hearing is commenced pursuant to § 362(e)(2) of the Code unless within that time at or after the final hearing the court determines that the stay be continued."

As so modified, Interim Rule 4001 is adopted as a Local Rule of this court and may be cited as Modified Interim Rule 4001.

Local Rule Eleven

Grant or Denial of Discharge

Interim Rule 4002 is modified so as to read as follows:

"Bankruptcy Rule 404 applies in cases filed under chapter 7, Liquidation, of the Bankruptcy Code except that (1) the references to § 14(c) of the Act shall be read as references to § 727(a) of the Code and (2) notwithstanding subdivision (d) of Rule 404 the court shall defer the entry of an order granting a discharge for 45 days and, on application within the 45 day period, the court may for cause further defer entry of the order to a date certain."

As so modified, Interim Rule 4002 is adopted as a Local Rule of this court and may be cited as Modified Interim Rule 4002.

Local Rule Twelve

Reaffirmation: Discharge Hearing

(a) Application by a debtor for approval of a reaffirmation agreement shall be filed not later than 15 days after the execution of such agreement, and in no event later than 60 days after the expiration of the date fixed as the last day for the filing of objections to the debtor's discharge, unless the time be extended for cause shown. Such application shall specify the nature of the debt which the debtor wishes to re-affirm and shall have annexed to it as an exhibit the agreement of reaffirmation.

(b) Within no more than 45 days after the entry of an order granting or denying a discharge, and on at least 10 days notice to the debtor, the trustee and to a creditor whose debt is the subject of a reaffirmation application, the court shall hold a hearing as provided in § 524(d) of the Bankruptcy Code.

LOCAL RULE THIRTEEN

Jury Trial

Interim Rule 9001 is modified as follows:
(1) Subdivision (c) of said Interim Rule is modified so as to read:

"(c) *Filing; Waiver.* A demand for a jury trial shall be filed in the office of the clerk within five days after it has been served. The failure of a party to serve and/or file a demand as required by this rule constitutes a waiver by him of trial by jury."

(2) Subdivision (d) of said Interim Rule is modified so as to read:

"(d) *Applicability of Certain of the Federal Rules of Civil Procedure; Size of Juries.* Rule 47 and Rules 49, 50 and 51 of the Federal Rules of Civil Procedure apply when a jury trial is conducted. The jury shall consist of six members in all jury cases, with three peremptory challenges to each opposing party. In its discretion, the court may impanel not more than two alternate jurors, with one peremptory challenge allowed to each of the opposing parties."

As so modified, Interim Rule 9001 is adopted as a Local Rule of this court and may be cited as Modified Interim Rule 9001.

LOCAL RULE FOURTEEN

Limit on Interrogatories

Interrogatories propounded by any party to the adversary party or parties shall be limited to two sets of questions, as follows:

(a) The first set of questions shall not exceed 30 in number, and any subpart of a question shall be counted as a question;
(b) The second set of questions shall not exceed 20 in number, and each subpart shall constitute a question.
(c) No third set of interrogatories, nor interrogatories in addition to those hereinabove fixed shall be allowed, except by order of the court for good cause shown.

LOCAL RULE FIFTEEN

Answers to Interrogatories

When answering interrogatories and requests for admission, the replying party shall, as part of his answer, set forth immediately preceding the answer the question or request to which such answer is given. Failure to comply with this rule shall result in the clerk's refusal to file same.

Local Rule Sixteen

Briefs and Memoranda of Law

Whenever a trial brief or memorandum of law is required or permitted by the court, such brief or memorandum shall not exceed 25 pages without prior approval of the court. Each brief or memorandum filed shall be accompanied by the certificate of the attorney filing it to the effect that a copy of the brief or memorandum has been served upon the attorney for the opposing party or parties.

Local Rule Seventeen

Membership in the Bar of this Court; Discipline of Attorneys

(a) The Bar of this court shall consist of attorneys who have been admitted to practice before the District Court or who may hereafter be so admitted, and who remain members in good standing of the Bar of that court.

(b) The first attorney to appear for a party in any case or proceeding commenced or pending in this court shall be the attorney of record for that party in said case or proceeding. Appearance may be by a firm if one or more members of the firm are members of the Bar of this court.

(c) There shall be only one attorney of record for a party.

(d) All pleadings, motions, orders or other papers required or permitted to be served on the attorney for a party shall be served on the attorney of record for that party.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN THE MATTER OF ESTABLISHING
LOCAL RULES OF THIS COURT

ORDER ESTABLISHING LOCAL RULES

The undersigned Bankruptcy Judge for the Northern District of Mississippi does hereby adopt the foregoing Local Rules, effective October 1, 1979. These Local Rules shall apply to all cases commenced under Title 11 of the United States Code after September 30, 1979 and to all civil proceedings arising under said Title, or arising in or related to cases under said Title.

The Clerk will cause this order and the Local Rules attached hereto to be spread upon the records of this Court and shall forward certified copies to the Clerk of the District Court, to the Supreme Court, to the Chief of the Bankruptcy Division of the Administrative Office of the United States Courts; and to the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States.

This order and the rules hereto attached shall be distributed by the Clerk to the Members of the Bar.

ORDERED AND ADOPTED, this the 1st day of October, 1979.

/s/Eugene J. Raphael
United States Bankruptcy Judge

The foregoing order and the Local Bankruptcy Rules attached thereto are hereby approved and adopted this 1st day of October, 1979.

/s/William C. Keady
United States District Judge

/s/Orma R. Smith
United States District Judge

PROCEDURES FOR SECURED CREDITORS

1. *Abandonment.* Probably the simplest and easiest way a secured creditor, whose collateral is worth less than the indebtedness secured, can free the collateral from the control of this court is to file an application, under Sections 554(b) and 102(1) of the Bankruptcy Code, requesting the court to order the trustee to abandon the property. Such an application must be accompanied by a note to the effect that unless an objection and a request for a hearing is served on the creditor's attorney and filed with the court not more than fifteen days from the date of [*sic*] the application is filed, the court will act on the application without a hearing. The notice and application when filed must be accompanied by a certificate under penalty of perjury (28 U.S. Code, Sect. 1746), showing service of the notice and of the application (including Exhibits) upon the debtor, his attorney, the trustee or interim trustee and/or the debtor in possession and by a filing fee of $15.00. Checks and money orders should be made payable to Clerk, U.S. Bankruptcy Court. *The original and 4 copies of a proposed order, a stamped, self-addressed envelope and a stamped envelope addressed to yourself, the trustee, the debtor and his attorney should be enclosed.*

The application must:

(1) Have attached to it as Exhibits completely legible photo copies of the entire security agreement and of any title certificate issued or U.C.C. Financing statement(s) filed in connection with same;
(2) State the nature of the debt and the amount owing for balance of principal, interest, late charges and attorney's fee;
(3) State when the security interest attached and when and in what manner it was perfected;
(4) State whether and when any default has occurred;
(5) Describe the property for which abandonment is sought and
(6) State the market value of said property.

2. *Complaint.* A creditor may, in the alternative, proceed by filing a complaint under Sect. 362(d) of the Bankruptcy Code for relief from the automatic stay. Such a complaint shall name as defendants the debtor(s) as well as the trustee or interim trustee and/or the debtor in possession and shall allege the same matters and have annexed to it the same Exhibits as are required for the application for abandonment described in paragraph 1, above. There is a filing fee of $15.00 on filing the complaint (check payable to Clerk, U.S. Bankruptcy Court).

3. *Exemption.* The trustee is no longer required to file an exemption report. Unless the trustee or another interested party objects within 15 days after the meeting of creditors to an exemption claimed by an individual debtor in his schedules, and if the time to object is not extended by the Court, all exemptions claimed by the debtor in his schedules are automatically allowed. If after such time has elapsed the property covered by a security agreement thus become [*sic*] exempt property, it is then out of the estate and the creditor is then

free to take such steps as he may choose to enforce his rights to that property, subject, however to such rights as the debtor may have to avoid a lien on the collateral under Section 522(f) or to redeem the collateral under Section 722 of the Bankruptcy Code.

EUGENE J. RAPHAEL, Bankruptcy Judge

LOCAL RULES OF BANKRUPTCY PROCEDURE

SOUTHERN DISTRICT OF MISSISSIPPI

Local Rule No. 1

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

Duties of Attorney For Debtor in Chapter 7 Cases

Each attorney filing a Chapter 7 (liquidation) bankruptcy petition with this court shall promptly perform the following acts and procedure:

1. Prior to filing the petition, the attorney shall personally review the petition to determine and insure that

A. The correct form has been used;

B. The petition has been completed and is accurate;

C. All state and federal exemptions available have been properly claimed with the correct statutory citations;

D. All of the debtor's assets and property has been accurately identified;

E. All lien creditors, their security interests and the collateral are accurately described;

F. The debtor has signed the petition at all appropriate places; and

G. The attorney's statement of compensation from the debtor is included in or filed with the petition.

2. After filing the petition, the attorney must determine the name of the person appointed by the court to serve as the trustee for the debtor. The attorney shall fully cooperate with the trustee in the performance of the trustee's duties and shall keep the trustee advised of all matters pertinent to the debtor and the administration of the estate.

3. If the debtor operates a business, the attorney shall obtain all business records, ledgers, journals and cancelled checks of the debtor, all keys to the debtor's business, insurance policies, leases and contracts of the debtor. Such items should be delivered to the trustee within three days after the trustee's appointment.

4. The attorney shall determine whether the debtor wishes to retain any assets subject to a security interest or lien, and shall contact the creditors to determine the fair value of the collateral and whether the creditor desires a lump-sum payment or will refinance for the debtor. The attorney shall determine whether such collateral is exempt property; whether there is any equity in the property for the debtor's estate, and whether the property is redeemable under 11 U.S.C. § 722.

5. In determining the value of automobiles and trucks, the court shall use as a rule of thumb the "average trade-in" value stated in the most recent issue of the "NADA Official Used Car Guide," Southeastern Edition, as the fair value of the vehicle for redemption purposes.

6. When the debtor wishes to redeem personal property, the attorney shall, within two weeks after the filing of the petition, attempt to reach an agreement on behalf of the debtor with the creditor holding the security inter-

est either (1) for the debtor to pay the present fair value of the collateral in a lump sum; or (2) the creditor to refinance the present fair value of the collateral. If no agreement can be reached with such creditor, the attorney shall direct the debtor to surrender possession of the collateral to the trustee.

7. The attorney shall take special care to claim as exempt any equity in an automobile of the debtor in accordance with 11 U.S.C. § 522(d)(2).

8. In a no-asset case, if it is determined that the automobile encumbered by a security interest that the debtor is using has no collision insurance, the attorney shall immediately contact the creditor holding the security interest who must then obtain such insurance.

9. Creditors holding security must send copies of their security agreements to the trustee. The attorney for the debtor is under a duty to communicate this fact to the creditor as soon as possible.

10. The attorney shall use diligent effort to prevent the debtor from agreeing to a redemption of property for more than its present fair value and from reaffirming any indebtedness which is not in the best interest of the debtor. Your duty to the debtor includes protecting the debtor from creditors' improper actions as well as imprudent acts of his own.

11. The attorney shall appear at the first meeting prepared to inform the trustee of any agreements to redeem personal property between the creditors and the debtor. The attorney should at that time have prepared all petitions and orders necessary to finalize redemption or reaffirmation.

12. The attorney shall appear at the final discharge hearing with his client, prepared to answer any questions from the Court concerning the debtor's estate, especially questions concerning petitions for reaffirmation. Petitions for reaffirmation will be approved or denied at this hearing.

DATED at Jackson, Mississippi, this the 1st day of February, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

LOCAL RULE No. 2

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi hereby adopts and promulgates the following rule:

Reassumption Agreements Concerning Vehicles in Chapter 7 Cases

Any creditor and debtor wishing to enter into a reassumption agreement concerning a vehicle must follow the procedures set out below:

1. At the meeting of creditors, the creditor must submit in writing an application for Court approval of any agreement to reassume debts on vehicles, said application setting forth the terms and conditions of the agreement and a space for the signature of the debtor, the creditor and the trustee.

(a) This procedure shall amount to tentative approval of the reassump-

tion agreement, subject to final approval by the Court at the discharge hearing.

2. Should the attorney for the trustee become involved in the preparation and/or presentation of pleadings and orders relating to the reassumption agreement and its final approval, a reasonable administrative fee not to exceed $100 shall be assessed to the creditors to cover the trustee's attorney's fees. [vacated by Local Rule No. 9]

DATED at Jackson, Mississippi, this the 1st day of February, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

Local Rule No. 3

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi hereby adopts and promulgates the following rule:

Any creditor holding a security interest in property of the debtor's estate may request that the trustee abandon such property pursuant to 11 U.S.C. § 554. Any creditor seeking an abandonment of property must follow procedures set out below:

1. The creditor should petition for abandonment of property. This petition should contain:

(a) the name of the creditor;
(b) identification of the property sought to be abandoned;
(c) a statement of the grounds for the petition; and
(d) a space for the debtor, creditor and trustee's signature of approval.

2. Consensual agreement among the above interested parties will constitute a waiver of any statutory notice and hearing otherwise required under § 554(b).

3. An order abandoning the property should also be prepared and presented by an attorney for the Bankruptcy Judge's signature.

4. All pleadings and orders pertaining to the abandonment of property shall be prepared and submitted for execution by the Court at the meeting of creditors.

5. If the creditor does not prepare these pleadings and orders, the attorney for the trustee shall prepare the forms for the creditor, and a reasonable administrative attorney's fee not to exceed $100 will be assessed to the creditor to cover the trustee's attorney's fees. Any request for fees in an amount greater than $100 shall require separate approval from the Court. [vacated by Local Rule No. 9]

6. After the order for abandonment of property has been entered, the creditor will contact the debtor's attorney to set a time for the creditor to take possession of the abandoned property.

DATED at Jackson, Mississippi, this the 15th day of April, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

LOCAL RULE NO. 4

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi hereby adopts and promulgates the following rule:

Any Debtor holding personal property for personal, family or household use that is subject to a judicial lien or a nonpossessory nonpurchase money security interest, may request to avoid said lien to the extent that it impairs any exemption of that property, pursuant to 11 U.S.C. § 522(f). The Debtor may request an avoidance of a transfer of personal property, otherwise exempt, upon inaction of the trustee to seek the avoidance.

Any Debtor seeking to avoid a lien or transfer of property must follow the procedure set out below:

On Schedule B-4—Property Claimed as Exempt type:

"ANY LIEN WHICH MAY BE AVOIDED PURSUANT TO 11 U.S.C. 522(f) SHALL BE AVOIDED FOR THE BENEFIT OF THE DEBTOR(S)."

DATED at Jackson, Mississippi, this the 1st day of February, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

LOCAL RULE NO. 5

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

Attorneys' Fees for Chapter 7 and Chapter 13 Cases

Each attorney filing a Chapter 7 (Liquidation) or Chapter 13 (Wage Earner) bankruptcy petition with this Court shall submit therewith requisite Disclosure Statements (Attorney's statement of compensation).

At the first meeting of creditors, the Interim Trustee or Trustee will consider the attorney's statement of compensation in order to insure that:

A) All of the duties of the attorney have been performed pursuant to Local Rule No. 1;
B) All of the duties expected of a competent attorney have been performed;

C) Said compensation is commensurate with the quality of work demanded by this Court.

If the presiding Trustee believes that any or all of the foregoing have not been met, he may, accordingly, enter his objection to the allowance of all or any part of the attorney's compensation.

The Court shall consider the Trustee's objection and rule accordingly.

DATED at Jackson, Mississippi, this the 18th day of June, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

LOCAL RULE No. 6

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

1. The responsibility for checking the Master Address List of Creditors against the Bankruptcy Schedules of the Debtor shall be that of the Attorney for the Debtor or the Debtor filing pro se, and not the responsibility of the Clerk or Deputy Clerks of the Bankruptcy Court. Therefore, it is incumbent upon the Debtor or his Attorney to positively list every creditor listed on the schedules, the Attorney for the Debtor, and the petitioning Debtor as well, upon the Master Address List with their corresponding current and proper mailing addresses.

2. The Bankruptcy Clerk's Office will not furnish copies or material on file to any requesting party until check or money order in the proper amount has been received in advance. Copy fee is Fifty Cents ($.50) per page and record search is Two Dollars ($2.00) per search. Checks or money orders must be made payable to:

Clerk, U.S. Bankruptcy Court
P.O. Drawer 2448
Jackson, Mississippi 39205

IF CASH IS SENT, IT MUST BE AT THE SENDER'S RISK.

3. Any party requesting a copy of the § 341 meeting (first meeting of creditors) may obtain said copy of the recorded proceedings by:

(1) Making a copy of the recording in the Office of the Clerk of the Bankruptcy Court by furnishing their own recording machine and tape, or
(2) By hiring a licensed Court Reporter to come to the Office of the Clerk of the Bankruptcy Court to transcribe said tape.

Upon verified transcription of said recording by either of the above methods, certification by the Clerk of the Bankruptcy Court must be made before

same can be given evidentiary effect.

DATED AT Jackson, Mississippi, this the 18th day of June, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

LOCAL RULE No. 7

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

Filing Fees in Chapter 13 Petitions

Any debtor filing a petition, pursuant to 11 U.S.C. §§ 1301-1331 and Chapter 13 of the Bankruptcy Code of 1978, must make one of the following elections regarding the payment of filing fees as required under 28 U.S.C. § 1930(a)(1):

1. Submit with the Chapter 13 Petition Sixty and No/100 Dollars ($60.00) in the form of cash, money order or check of the debtor's attorney; or
2. If payment of the Sixty and No/100 Dollars ($60.00) filing fee does not accompany the Chapter 13 Petition, said filing fee will automatically be paid and provided for under debtor's Plan for Adjustments of Debts.

DATED at Jackson, Mississippi, this the 15th day of August, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

LOCAL RULE No. 8*

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

Any creditor or interested party desirous of a filed copy of a Chapter 13 Petitioner's Plan for Adjustment of Debts filed with this Court from the Jackson or Western Division of the Southern District and pursuant to Interim Bankruptcy Rule 1002 shall make his/her request and obtain said copy from the attorney of record for the petitioner.

DATED at Jackson, Mississippi, this the 19th day of August, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

* Vacated November 10, 1980. Replaced by Local Rule No. 13.

Local Rule No. 9

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

Paragraph number 2 of Local Rule No. 2 dated February 1, 1980, and Paragraph number 5 of Local Rule No. 3 dated April 15, 1980, are hereby vacated and the following adopted:

(a) Pursuant to § 330(a)(2) which entitles a Trustee to "reimbursement for actual necessary expenses" any Trustee on the Panel is authorized to assess the debtor, creditor or any interested party for actual necessary expenses incidental to the Trustee's duties at the instance of or for the benefit of said debtor, creditor or interested party, not to exceed a charge of $25.00 per debtor, creditor or interested party in each consumer bankruptcy. This local rule is obviated by the fact that the Trustees serving on the Trustee Panel created under the Bankruptcy Reform Act of 1978, are incurring secretarial, clerical, general office and insurance expenses not contemplated for nor provided in the statutory fee provision of § 330(b).

(b) A Trustee may increase his requests for reimbursement for reasonable necessary expenses, upon Court approval, in non-consumer bankruptcies.

Dated at Jackson, Mississippi, this the 19th day of September, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

Local Rule No. 10

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

After hearings held in the Bankruptcy Court, the prevailing party shall submit an order, consistent with the Court's ruling, within five (5) days of the hearing for the Court's approval and entry.

DATED at Jackson, Mississippi, this the 15th day of October, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

LOCAL RULE No. 11

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

Final Meeting

The Court shall order a final meeting of creditors in every case in which the net proceeds realized exceed $500 and shall mail a summary of the trustee's final account to the creditors with the notice of the meeting. The trustee shall attend the final meeting and shall, if requested, report on the administration of the estate.

DATED at Jackson, Mississippi, this the 3rd day of November, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

LOCAL RULE No. 12

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

In accordance with 11 U.S.C. § 363(b) a trustee is required to give notice of any proposed use, sale, or lease of property of the estate, other than in the ordinary course of business. Accordingly, the trustee shall be required to do all noticing, mailing, and shall be responsible for sending a certificate of mailing of the notice to the Bankruptcy Court Clerk's Office.

DATED at Jackson, Mississippi, this the 5th day of November, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

LOCAL RULE No. 13

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

Local Rule No. 8 dated August 19, 1980, is hereby vacated and the following adopted:

1. In accordance with Bankruptcy Rule 13-201, the debtor shall furnish to the Court a sufficient number of copies of the summarized Chapter 13 plan to enable the Court to mail a copy to each creditor. These copies shall be furnished with the filing of the original petition or within 10 days thereafter.

2. The attorney for the debtor shall prepare and present a Master Address List on forms provided by the Office of the Clerk of the Bankruptcy

Court. The Master Address List shall include the correct mailing addresses of the debtor, the attorney for the debtor, and all creditors listed on the bankruptcy petition schedules. The responsibility for checking the accuracy of the Master Address List shall be that of the attorney for the debtor or the debtor filing pro se, and not the responsibility of the Bankruptcy Court.

3. In the event the debtor seeks modification of the Chapter 13 plan after confirmation, pursuant to 11 U.S.C. § 1329, the attorney for the debtor shall send notice of such modification, accompanied by a copy or a summary of the proposed modification and giving a date within which to object, to all creditors and parties in interest. Copy of the notice, including a Certificate of Mailing, shall be filed with the Court. Prior to filing the proposed modification, the attorney for the debtor shall contact the Court for a hearing date. If no objection to modification is timely filed, the Court may, without a hearing, approve the plan as modified.

DATED at Jackson, Mississippi, this the 19th day of January, 1981.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

Effective October 1
BANKRUPTCY CHANGES ANNOUNCED

Joint Announcement by
Barney E. Eaton, III
Bankruptcy Judge for the
Southern District of Mississippi

and

Harvey G. Henderson, Clerk
U.S. District Court for the
Southern District of Mississippi

TO ALL MEMBERS OF THE BAR:

Your attention is called to the "Bankruptcy Reform Act of 1978," which, for all practical purposes, will go into effect on October 1, 1979, and will govern all cases commenced under Title 11, United States Code, after September 30, 1979.

One of the changes made by this act is the place of filing petitions commencing a case under the new Title 11. On and after October 1, 1979, petitions will NO LONGER be filed in the office of the Clerk of the United States District Court, but ARE to be filed in the office of the Clerk of the United States Bankruptcy Court, Jackson, Mississippi.

The Clerk of the United States Bankruptcy Court for the Southern District of Mississippi, will be Mrs. Mollie C. Jones. Her office will be physically located at 1619 Deposit Guaranty Building, 200 East Capitol Street, Jackson, Mississippi. The mailing address will be Post Office Drawer 2448, Jackson, Mississippi 39205, and the telephone number will be 601/353-5221.

Filing fees are prescribed by § 1930 of Title 28, U.S. Code. The filing fee must be paid at the same time that the petition is presented for filing, except that an individual who is filing a voluntary case or a joint case may pay the fee in installments if he files with the petition an application which complies with Bankruptcy Rule 107. The filing fee in Liquidation Cases (straight bankruptcy) and in Chapter 13 cases will be $60.00. All checks for filing fees are to be made payable to the order of Clerk, U.S. Bankruptcy Court.

For convenience of debtors and their attorneys, in cases where immediate filing is essential for the purpose of preventing a foreclosure or execution sale of debtor's property, or to stop the garnishment of a debtor's wages, or other similar emergency situation, the Clerk of the District Court and his deputies have been made deputy clerks of the Bankruptcy Court for the purpose of filing petition [*sic*] under Title 11 which are *HAND-CARRIED* to any office of the Clerk of the United States District Court. Such petitions will be deemed to have been filed in the Bankruptcy Court as of the date they are delivered to the office of the Clerk of the District Court. However, where filing is made by mail, the ONLY place to file will be in the office of the Clerk of the Bankruptcy Court at Jackson, Mississippi. All papers subsequent to the originating petition are to be filed ONLY in the office of the Clerk of the Bankruptcy

Court at Jackson, Mississippi.

Attorneys practicing in the Bankruptcy Court will be expected to familiarize themselves, prior to October 1, 1979, with the changes made in Titles 11 and 28, U.S. Code, by the Bankruptcy Reform Act of 1979.

To summarize:

1. Bankruptcy petitions and Chapter Case petitions filed before October 1, 1979, will continue to be filed in the office of the Clerk of the United States District Court, and such cases will be governed from start to finish by the provisions of the present Bankruptcy Act and Rules.

2. All cases commenced under the Bankruptcy Code (Title 11, U.S. Code) after September 30, 1979, will be filed only in the office of the Clerk of the Bankruptcy Court, Jackson, Mississippi, except for EMERGENCY filings as outlined above.

3. New Rules of Bankruptcy Procedure are under consideration and the local Bankruptcy Court will adopt new Rules very soon and make an announcement concerning the new Rules and how copies may be obtained.

This the 20th day of September, 1979.

/s/Barney E. Eaton, III
Bankruptcy Judge

/s/Harvey G. Henderson
Clerk

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

Instructions for Properly Filing Petitions Under the Bankruptcy Code

1. A petition incorrectly filed under the new Code will not be processed *or* a meeting of creditors scheduled until an amendment is correctly filed. Failure to promptly amend may result in the debtor's attorney being ordered to refund his fee to the debtor or if debtor's attorney has not been paid, compensation may be ordered denied.

2. On and after October 1, 1979, petitions are NO LONGER filed in the office of the Clerk of the United States District Court, but ARE filed in the office of the Clerk of the United States Bankruptcy Court, Jackson, Mississippi.

3. The Clerk of the United States Bankruptcy Court for the Southern District of Mississippi, is Mrs. Mollie C. Jones. Her office is located at 1619 Deposit Guaranty Building, 200 East Capitol Street, Jackson, Mississippi. The mailing address is Post Office Drawer 2448, Jackson, Mississippi 39205, and the telephone number is 601/353-5221.

4. Filing fees are prescribed by § 1930 of Title 28, U.S. Code. The filing fee must be paid at the same time the petition is presented for filing, except that an individual who is filing a voluntary case or a joint case may pay the fee in installments if he files with the petition an application which complies with Bankruptcy Rule 107. The minimum amount of an installment payment on a filing fee is $15.00. The period of time within which the payment of filing fees can be paid in installments is four months. The application for payment of filing fees in installments should be prepared accordingly. The filing fee in Liquidation Cases (straight bankruptcy) and in Chapter 13 cases is $60.00. All checks and money orders for filing fees are to be made payable to the order of Clerk, U.S. Bankruptcy Court. *A personal check on the debtor will not be accepted.* If cash is submitted for any fee, the *EXACT AMOUNT* must be presented inasmuch as the Bankruptcy Clerk's office will not have adequate means of making change.

5. For convenience of debtors and their attorneys, in cases where immediate filing is essential for the purpose of preventing a foreclosure or execution sale of debtor's property, or to stop the garnishment of a debtor's wages, or other similar emergency situation, the Clerk of the District Court and his deputies have been made deputy clerks of the Bankruptcy Court for the purpose of filing petition [*sic*] under Title 11 which are *HAND-CARRIED* to an office of the Clerk of the United States District Court in Hattiesburg, Meridian, and Biloxi. Such petitions will be deemed to have been filed in the Bankruptcy Court as of the date they are delivered to the office of the Clerk of the District Court in these three divisions only. However, where filing is made by mail, the ONLY place to file will be in the office of the Clerk of the Bankruptcy Court at Jackson, Mississippi. All papers subsequent to the originating petition are to be filed ONLY in the office of the Clerk of the Bankruptcy Court at Jackson, Mississippi.

6. The attorney for the debtor must show his telephone number on the petition. If debtor is not represented by an attorney, debtor's telephone number must be shown on the petition.

7. All petitions shall include the Zip Code Number, as prescribed by the United States Post Office Department, for the debtor, his attorney and all persons listed in a debtor's schedules.

8. All petitions shall state the full name of an individual debtor—not merely initials. The blank following each item of the schedules must be filled in to show the facts. If the answer if [*sic*] "none", it shall be so stated.

9. Debtors, until their proceedings are closed, shall promptly notify the Bankruptcy Clerk's office *in writing* with respect to each and every change of address including new Zip Code.

10. A petition must be signed by the debtor and the attorney and must be notarized.

11. A petition must have a Social Security number for individuals and a Tax Identification number for corporations.

12. Under Rule 108, the United States Bankruptcy Clerk may accept the debtor's petition with a list of all the debtor's creditors with their addresses and Zip Codes; and, the schedules and Statement of Affairs must be filed within 10 days thereafter.

13. The attorney's Disclosure of Fees under Rule 219(b) *MUST* be filed at the time the original petition and schedules are filed with the United States Bankruptcy Clerk.

14. When filing a petition with the United States Bankruptcy Clerk, the following number of copies of the petition, statement of affairs, and schedules are required: Chapter 7—original and 2 copies; Chapter 9—original and 5 copies; Chapter 11—original and 5 copies; Chapter 13—original and 2 copies. The debtor's attorney *MUST ALSO PREPARE AND PRESENT* one Master Address List on *forms provided by the Bankruptcy Clerk.*

IT IS IMPORTANT THAT ONLY THE PRESCRIBED FORM BE USED, and that the instructions for it's [*sic*] use be carefully followed. The overall size of the form and address blocks thereon are especially designed for equipment now used by the Bankruptcy Clerk's office. Use of the separate address sheet will enable the Bankruptcy Clerk's office to reproduce address labels by a photocopy process. This system will provide improved service to petitioners and will significantly expediate the mailing of notices to creditors. The name and address, including Zip Code, *MUST BE FURNISHED FOR ALL CREDITORS* listed in Schedules A-1, A-2, and A-3 and co-signers of any debt. *Use the first two boxes for* names and addresses of the attorney and debtor. *DO NOT TYPE ON THE MASTER ADDRESS FORM,* but use it as a guide behind a sheet of bond paper the same size. Be sure the entire address is within the address block. *ONLY ONE NAME AND ADDRESS PER BLOCK EXCEPT FOR THE DEBTOR WHICH IF IT IS A HUSBAND AND WIFE MAY BE IN ONE BLOCK IF THEY HAVE THE SAME ADDRESS.*

15. Any correspondence requiring an answer from the Bankruptcy Clerk should be accompanied by a stamped, self-addressed envelope.

INSTRUCTIONS FOR FILING A CHAPTER 13

1. The plan must be filed by the debtor either with the filing of the original petition or within 10 days thereafter.

2. When the plan is filed, there should be included a sufficient number of plans to be distributed to each creditor along with five copies for the court file.

3. The debtor must file a supplement to the Chapter 13 Statement of the exemption law which would be selected, and the property which would be claimed as exempt, if the debtor's estate were liquidated under Chapter 7.

HYPNOSIS AND THE LAW OF EVIDENCE: TESTIMONY FROM THE HYPNOTICALLY-REFRESHED MEMORY

*Chester L. Quarles**

I. INTRODUCTION

"Hypnosis" is a provocative term. It brings to mind primitive religions, witchcraft, faith healing, and stage magicians. The extensive use of hypnosis, in fact, belies these negative connotations. The medical profession has recognized hypnosis as a valuable therapeutic technique since before the turn of the century.[1] Dentists have hypnotized patients instead of using anesthetic,[2] and obstetricians have, similarly, used hypnosis to relieve their patients' pain during childbirth.[3]

In recent years, law enforcement agencies, also, have found hypnosis useful, and it has developed into an important investigative tool.[4] Simultaneously, the evidentiary implications of its

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In 1979, Professor Quarles attended the Institute of Forensic Hypnosis (Martin Reiser, Director) in Los Angeles, California. Since that time, he has conducted six forensic hypnotic interviews in Mississippi in connection with criminal investigations.

[1] *See generally* G. AMBROSE & G. NEWBOLD, A HANDBOOK OF MEDICAL HYPNOSIS 1-12 (3d ed. 1968) (discussing history of medical hypnotism); W. KROGER, CLINICAL AND EXPERIMENTAL HYPNOSIS 1-5 (2d ed. 1977) (same).

[2] *See* G. AMBROSE & G. NEWBOLD, *supra* note 1, at 174-77 (discussing dental anesthetic); P. BLYTHE, HYPNOTISM—ITS POWER AND PRACTICE 105-11 (1971) (noting dental uses of hypnosis); W. KROGER, *supra* note 1, at 321-22 (same). *See generally* F. MARCUSIE, HYPNOSIS THROUGHOUT THE WORLD 274-77 (1964) (history of dental use of hypnosis in United States).

[3] *See* G. AMBROSE & G. NEWBOLD, *supra* note 1, at 266-67 (discussing use of hypnosis to relieve pain at childbirth); W. KROGER, *supra* note 1, at 227 (same); F. MARCUSIE, *supra* note 2, at 274 (same).

[4] M. REISER, HANDBOOK OF INVESTIGATIVE HYPNOSIS 5-6 (1980). *See* H. ARONS, HYPNOSIS IN CRIMINAL INVESTIGATIONS 3-10 (1967) (use of hypnosis in police investigations).

use have become one of the most controversial subjects in the criminal law arena.[5] To a lesser extent, hypnosis has been an issue in civil cases as well.[6] Because hypnosis can be used for different purposes in the context of a legal controversy,[7] the issues raised have varied.[8]

The scope of this article is limited to consideration of the admissibility of testimony from the hypnotically-induced witness. As the term is used in this article, "hypnotically-induced witness" refers to any person, other than the defendant in a criminal trial,[9] testifying from a memory that has been refreshed by hypnosis. Discussion is limited to this subject for primarily two reasons: First, the use of hypnotically-induced witnesses may be an issue in both criminal and civil cases and, thus, is a matter of potential concern to all lawyers. Second, as the following account illustrates,[10] the issue of the admissibility of testi-

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[5] *Compare* Dilloff, *The Admissibility of Hypnotically Induced Testimony*, 4 OHIO N.U.L. REV. 1, 22-23 (1977) (hypnosis has serious dangers making testimony less credible) *with* Comment, *Hypno-Induced Statements: Safeguards for Admissibility*, 1970 LAW & SOC. ORDER 99, 119 (hypnotically-induced statements not less credible than other testimony).

[6] *See, e.g.*, Kline v. Ford Motor Co., 523 F.2d 1067, 1069-70 (9th Cir. 1975) (witnesses' memory refreshed by hypnosis in strict liability case); Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509 (9th Cir. 1974) (testimony of passenger in helicopter crash who had received hypnotic treatments allowed).

[7] *See generally* W. BRYAN, LEGAL ASPECTS OF HYPNOSIS 193-226 (1962) (listing various applications of hypnosis to law).

[8] Legal treatment of the various issues is discussed in Annot., 92 A.L.R.3d 442 (1979) (admissibility of hypnotic evidence at criminal trial). For other discussions of the uses of hypnosis and issues raised, see the following: Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313 (1980); Dilloff, *supra* note 5; Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567 (1977); Teitelbaum, *Admissibility of Hypnotically Adduced Evidence and the Arthur Nebb Case*, 8 ST. LOUIS U.L.J. 205 (1963); Comment, *supra* note 5; Comment, *Hypnosis as a Defense Tactic*, 1969 TOL. L. REV. 691; Comment, *Refreshing the Memory of a Witness Through Hypnosis*, 5 U.C.L.A.—ALASKA L. REV. 266 (1976).

[9] For a discussion of the rights of a criminal defendant to be hypnotized as an aid to preparing his defense, see Annot., 72 A.L.R.2d 1120 (1960) (attorney's right to be accompanied by psychologist or hypnotist when consulting with accused). *See also* Comment, *Hypnosis as a Defense Tactic*, *supra* note 8, at 694-96 (evolution of law as to use of hypnosis by defense in trials).

[10] This account is based on the author's personal knowledge. Certain facts have been changed to protect the identity of the child and to avoid prejudicing the ultimate disposition of the case in event of appeal.

mony from a hypnotically-induced witness is an issue soon to be faced in Mississippi.

In the summer of 1980, a southern Mississippi woman returned home following a short vacation. While handling the family laundry, she discovered blood on her daughter's underwear. Believing the child was prematurely menstruating, the mother sought to instruct her daughter accordingly. When the girl reacted negatively and became hysterical, the mother sought medical evaluation. The doctor concluded a vaginal penetration of some type had occurred. The child would only say that "a man" had hurt her.

When subsequent interviews with police officers and a psychiatric social worker failed to elicit further details from the girl, a hypnotist was contacted.[11] He obtained permission to hypnotize the child,[12] and through the use of relaxation techniques on her,[13] succeeded in achieving a relatively deep hypnotic induction.[14] In the hypnotic state the girl viewed the rape again, but as a spectator.[15] The hypnotist then asked her a series of ques-

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[11] The District Attorney's personal investigator contacted the hypnotist.

[12] The hypnotist obtained a waiver of rights and a formalized agreement that suit would not be brought on any action arising out of the hypnosis. The permission to hypnotize was signed by the mother and the child agreed to cooperate.

[13] After the child was told that she would be made to feel very comfortable the induction began. Pre-hypnotic and post-hypnotic suggestions were given to her to relieve anxiety and guilt and to aid in eliminating the nightmares that were directly associated with the incident.

In any hypnotic induction, the subject must have the ability to be imaginative and to visualize relaxing scenes that may not be real. Thus, it is sometimes difficult to hypnotize children or persons of low intelligence. *See* W. KROGER, *supra* note 1, at 45 (imbeciles, senile persons, and children less than six years old difficult or impossible to hypnotize); M. TEITELBAUM, HYPNOSIS INDUCTION TECHNICS 32 (1965) (low intelligence inhibits ability to be hypnotized).

Many people seeking hypnosis relate very well to tranquil scenes on the beach or shore, or to beautiful scenes in mountainous areas. *See generally* J. GORDON, HANDBOOK OF CLINICAL & EXPERIMENTAL HYPNOSIS 51 (1967) (suggestions of relaxation and concentration facilitate effects of hypnotic induction). Since the present subject was from a low-income home, the imagery was limited. The image used was a featherbed at the home of the child's grandmother, upon which the child enjoyed relaxing. She always felt loved, confortable, and safe at her grandmother's home, which was many miles from where the rape occurred.

[14] There are several stages or depths in hypnosis. *See* notes 43 through 50 and accompanying text *infra*.

[15] The victim is not asked to experience emotionally the trauma of the incident

tions about the incident.[16] Through them, the child gave significant details not given previously and eventually identified the "man" who had hurt her as her father.[17]

Subsequently, the child testified at her father's trial from this hypnotically-induced memory.[18] The hypnotist was not sub-

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again. A "disassociation technique" is used where the victim is in a safe environment with full police protection. She is able to visualize the past criminal occurrence through an imagined movie or television screen or through reading a book about what happened to her. The hypnotist can let the subject repeat all observations, feelings, and experiences and then "go back" or "play back" recent scenes just as if one were watching a televised sportscast. If the visualization is book-oriented, the inductee is asked to turn back to the pages of specific interest to the hypnotist. Great detail can be gleaned through television "stop-action" or through page fixation on the incident. The victim can be asked to concentrate deeply on the face of the perpetrator, his car, a tattoo, or some other identifying characteristic. *See generally* W. KROGER, *supra* note 1, at 75 (discussing use of television technique); M. REISER, *supra* note 4, at 158-62 (describing television and other retrieval techniques).

[16] In order that the danger of information being manufacturd may be reduced, leading questions should not be asked in forensic hypnosis interviews. *See* notes 61, 62 and accompanying text *infra; cf.* State v. Hurd, 173 N.J. Super. 333, 414 A.2d 291, 306 (Super. Ct. Law Div. 1980) (standard for admissibility of hypnotically-induced recollection precludes hypnotist from giving information or suggestions to witness).

[17] The following are the actual questions asked and answers given during the part of the interview leading up to identification:

Interviewer: "Did you see the face of the man who hurt you?"
Victim: "Yes."
Interviewer: "Do you know who he is?"
Victim: "Yes."
Interviewer: "Do you know his name?"
Victim: "Yes."
Interviewer: "Will you tell me his name?"
Victim: "Yes."
Interviewer: "What is his name?"
Victim: "Daddy."

[18] It is frequently the case that, once the information has been elicited under hypnosis, the witness will remember the same details afterward, even though he was unable to remember before the hypnosis. *See* H. ARONS, *supra* note 4, at 28-29 (amnesia easily dispelled by hypnosis); *see, e.g.,* Kline v. Ford Motor Co., 523 F.2d 1067, 1069 (9th Cir. 1975) (witness' amnesia caused by severe head injuries overcome by hypnosis). If the witness is later unable to remember the facts revealed by the hypnosis, it is possible that a court would allow the hypnotist to testify regarding the statements made during the hypnotic session, under the "statements made to a physician" hearsay exception, FED. R. EVID. 803(4). *See* Spector & Foster, *supra* note 8, at 604-06 (hypno-induced statements made to psychiatrists should be admissible under statements to physician exception) (citing United States v. Techoco, 542 F.2d 84, 89 n.6 (D.C. Cir. 1976) (statements to psychiatrists within purview of FED. R. EVID. 803(4)).

poenaed and the matter of the hypnosis was not raised at trial.[19] The defendant was convicted and is serving time in the state penitentiary at Parchman.

At present, Mississippi has no statutes and no case law addressing the issue of hypnosis.[20] The continued use of investigative procedures such as those described in the preceding account make it inevitable that the issue will be raised in the near future.[21] The purpose of this article is to help prepare Mississippi lawyers and judges for that event.

II. Hypnosis

A. *Definition*

Although hypnosis has been practiced for centuries,[22] the modern theory lacks a precise definition.[23] An understanding of

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[19] The defense attorney, judge, and prosecuting attorney were all aware that the hypnosis had taken place. It has been held that there is a duty to disclose the pre-trial hypnosis of a witness. *See* United States v. Miller, 411 F.2d 825, 830-31 (2d Cir. 1969) (defendant's motion for new trial granted where state failed to disclose pre-trial hypnosis of prosecution witness).

[20] The Office of the Attorney General has issued an opinion that indicates that hypnotically obtained evidence might be admissible in certain instances. *See* note 83 *infra* (text of opinion).

[21] At the present time there are, at best, 18 graduates of the Institute of Forensic Hypnosis who are working in Mississippi police, sheriff, or district attorney's offices. Several graduates of other professionally acceptable schools work in Mississippi as well.

The author has conducted five forensic hypnotic interviews in Mississippi at the time of this writing. All of the subjects interviewed were crime victims and included prepubertal homosexual and heterosexual rape victims, as well as victims of armed robbery.

[22] *See* Ladd, *Legal Aspects of Hypnotism*, 11 Yale L.J. 173, 174 (1902) (hypnotism is as old as human history and as widespread as the race).

[23] Varying definitions have been given by commentators on forensic hypnosis. *See, e.g.*, H. Arons, *supra* note 4, at 20 (concentrated suggestibility); Dilloff, *supra* note 5, at 3 (reduced state of consciousness); 14 Vand. L. Rev. 1509, 1510 (1961) (exaggerated suggestibility). *See generally* H. Spiegel & D. Spiegel, Trance and Treatment 11-34 (1978) (defining hypnosis); Diamond, *supra* note 8, at 316 (1980) (characteristics of hypnosis).

Even more varied than the definitions of hypnosis are the theories of the phenomenon. In 1890, the well-known London physician St. Clair Thompson hypothesized that hypnotism was "a disease which effects the nervous system." Thompson, *The Dangers of Hypnotism*, 9 Westminister Rev. 624, 626 (1890), *cited in* 14 Vand. L. Rev. 1509, 1509 (1961). The following excerpt states many of the modern theories of hypnosis:

> [T]here are the hereditary models which conceive of hypnosis as an inherited characteristic that reflects a phylogenetic and regressive group of qualities and

the phenomenon may be reached by considering how hypnosis affects the subject. In a hypnotic trance there is an alteration in consciousness and concentration,[24] yet the subject continues to maintain awareness.[25] Additionally, the subject manifests a higher degree of susceptibility.[26] Susceptibility, or suggestibility, is the most important element of the hypnotic trance and is characterized by the subject's willingness to respond to suggestion.[27] Therefore, hypnosis occurs when the hypnotist's suggestions elicit responses from the hypnotic subject.[28] Physical symptoms usually include listlessness or lethargy, fluttering of the eyelids, increase in heartbeat, and an increase in the rate of breathing.[29]

> traits . . . . There is a physiological model which conceives of hypnosis as a product of . . . the brain, such as areas of inhibition and areas of excitation, or the action of the reticular activating system. There is an internal environmental model which deals with the exchanges and interchanges of biochemical substances in the neural system throughout the brain. There is a learning model that conceives of hypnosis as a form of learning, like conditioning. There is a cultural social model which explains hypnosis in terms of contagious suggestibility and role-playing. There is a developmental motivational model which deals with various interpersonal and intrapsychic dimensions, such as dissociation and ontogenetic regression to earlier modes of thinking, feeling and behavior, involving an anachronistic revival of the child-parent relationship and related transference phenomena.

M. KLINE & L. WALBERG, THE NATURE OF HYPNOSIS: CONTEMPORARY THEORETICAL APPROACHES 6 (1962), *quoted in* Spector & Foster, *supra* note 8, at 569. *See generally* W. KROGER, *supra* note 1, at 26-32 (discussing theories of hypnosis); M. TEITELBAUM, *supra* note 13, at 8-15 (same).

[24] Spector & Foster, *supra* note 8, at 570.

[25] D. CHEEK & L. LECRON, CLINICAL HYPNOTHERAPY 13 (1968).

[26] *See generally* W. KROGER, *supra* note 1, at 7-8 (discussing the nature of suggestibility in hypnosis).

[27] Spector & Foster, *supra* note 8, at 570. Although the popular belief is that weak-willed persons or those who are accustomed to blind obedience make the best subjects, the consensus among scientists and physicians engaged in the research of hypnotism is that the overwhelming majority of people are hypnotizable. *Id.* at 575. The essential element is concentration. *See* Allen, *Hypnotism and Its Legal Import*, 12 CANADIAN B. REV. 14, 16 (1934) (susceptibility is dependent upon concentration); Ladd, *supra* note 22, at 175 (poor subjects are incapable of maintaining the requisite degree of concentration).

Tests are often used to assess an individual's susceptibility to hypnotism. For a discussion of the various tests, see H. SPIEGEL & D. SPIEGEL, *supra* note 23, at 35-150.

[28] Spector & Foster, *supra* note 8, at 570.

[29] *Id.* at 570-71. The rapidity of heartbeat and rate of breathing is explained as a function of apprehension by the subject of the new sensation. *Id.*

B. The Process of Hypnotic Induction

Induction has been described as "the entire body of events used for the communication of information from a hypnotist to his subject."[30] The techniques[31] used result in hypnosis and are designed to elicit the responses desired from the subject.[32] To begin the process the hypnotist should attempt to put the subject at ease by engaging in a discussion of the purpose of the session.[33] Any misconceptions regarding hypnosis may be clarified,[34] and the operator may explain the nature of activities in which the subject will be asked to engage or the type of questions he will be requested to answer.[35] The process continues with the operator's rhythmic, soothing instructions to relax.[36] Encouragement is mixed with suggestions that the subject is becoming sleepy.[37] As the subject responds, more difficult behavior

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[30] J. GORDON, *supra* note 13, at 74.

[31] Induction principally is accomplished verbally, but at least two other modes have been used successfully. *Id.* at 58. The discussion in the text centers upon the verbal mode since it is the primary mode used for the delivery of induction in modern hypnosis. *Id.* Gordon describes the other techniques as follows:

> *Physical contact,* in which some portion of the signal delivery is supported by manipulating the subject physically to suggest or compel a compliant response, or to reinforce a suggested response when it occurs.
>
> *Sensory-perceptual manipulation,* in which gadgets, devices, or machines are employed to capture the attention of the subject and mechanically increase receptiveness to the induction signal.

Id.

For other discussions of induction techniques, see G. ESTABROOKS, HYPNOTISM 24-30 (1957); M. TEITELBAUM, *supra* note 13, at 19-86.

[32] J. GORDON, *supra* note 13, at 74.

[33] *Id.* at 59. The conversation should allow the subject to adjust to his surroundings. *Id.*

[34] *Id.* Some common misconceptions are that the subject will be controlled by the operator, that hypnosis is a state of sleep, and that hypnosis is a physiological condition. *See* H. ARONS, *supra* note 4, at 11-20 (refuting these beliefs); W. KROGER, *supra* note 1, at 36-37 (same).

[35] If a person is known to be excessively frightened by the use of hypnosis, the operator may indirectly induce the subject into a trance without advance discussion. J. GORDON, *supra* note 13, at 60.

[36] *Id.* The subject is usually instructed to fix his gaze or concentration on one particular thing. *Id.*

[37] *Id.* When the initial instructions appear to be having effect, the operator adds suggestions that the subject will respond to the hypnotist during his "sleep" and will not "awaken" until instructed to do so. *Id.*

tests are administered,[38] generally accompanied by continuous "patter" that suggests relaxation and the ability to listen and respond to the operator.[39] The completion of induction is not readily distinguishable from the hypnotic state, for there is no precise moment where the former ceases and the latter becomes operative.[40] As the trance deepens, however, the hypnotist's need to emphasize that the subject attend to his suggestions decreases.[41] Additionally, the subject loses any self-conscious awareness of his perceptions.[42]

C. *Hypnotic States*

The hypnotic state is separable into six depths or levels,[43] each characterized by the mental and physical acts the subject is capable of performing at the particular level.[44] The first two stages involve a light or hypnoidal trance in which relaxation and muscular lethargy are experienced.[45] In the third and fourth stages, the subject will experience varying degrees of insensitivity to pain yet will retain the sense of touch.[46] By the fourth stage the subject will be susceptible to the hypnotist's suggestion that he is incapable of remembering.[47] In the fifth stage, the first stage of heavy trance, the subject may hallucinate in response to the suggestion of the hypnotist, and he will no longer experience

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[38] *Id.* These tests include suggestions that the subject will be unable to open his eyes, raise an arm, rise from a chair, stop rotating his hands in a circular motion, or stop repeating a phrase initiated by the operator. *See* G. ESTABROOKS, *supra* note 31, at 25-28. When the subject responds positively to one test, the operator may continue to the next test. *Id.*

[39] J. GORDON, *supra* note 13, at 60.

[40] *Id.* at 74.

[41] *Id.* at 74-75.

[42] *Id.* at 75. The conclusion is that "induction terminates only in the sense that explicit tuning operations [by the hypnotist] are reduced in frequency." *Id.*

[43] H. ARONS, *supra* note 4, at 137.

[44] *Id.* The operator must be able to ascertain the stage of trance depth since certain information-eliciting techniques and verification procedures depend on the depth achieved. *Id.*

[45] Comment, *Hypnosis as a Defense Tactic, supra* note 8, at 693.

[46] *Id.* Upon suggestion that his arm is under anesthetic, the subject should feel no pain when pinched, though he will feel the touch. H. ARONS, *supra* note 4, at 137-38.

[47] H. ARONS, *supra* note 4, at 138. The subject will forget familiar information, such as the day of the week and his address, when the operator suggests he has forgotten this data. *Id.*

touch or pain when so directed.[48] In the sixth stage, the deepest trance,[49] the subject may hallucinate spontaneously and, at the hypnotist's suggestion, lose his ability to see objects presented to him.[50]

D. Limitations on the Use of Hypnosis to Refresh Memory

It is generally accepted that the process of hypnosis has great investigative potential.[51] An eyewitness to an automobile accident or the victim of a criminal assault may be unable to recall significant details of the occurrence, even though he was fully conscious at the time.[52] Under optimum conditions, a trained hypnotist can obtain all or part of the forgotten details.[53] The value of such infomation for investigative purposes, especially in criminal cases, is clear.

When the hypnotic subject is not simply the source of helpful information, but testifies at trial from his hypnotically-refreshed memory, certain limitations on the accuracy of that memory must be considered. Several factors can serve to distort

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[48] *Id.*

[49] The deepest stage of hypnotism is also called somnambulism. Somnambulism is ordinarily associated with amnesia; acts are performed without later recognition. For a discussion of the physical characteristics that accompany somnambulism, see W. KROGER, *supra* note 1, at 20.

[50] H. ARONS, *supra* note 4, at 138. There are a variety of other scales that categorize trance depth. *See generally* W. KROGER, *supra* note 1, at 50-52 (discussing scales measuring trance depth); M. REISER, *supra* note 4, at 97-101 (same).

[51] *See* Teitelbaum, *supra* note 8, at 214 (hypnosis has potential as investigative technique, regardless of courtroom use); Comment, *Hypnosis as a Defense Tactic*, *supra* note 8, at 708 (hypnosis useful to obtain information for criminal defense).

[52] *See, e.g.*, Kline v. Ford Motor Co., 523 F.2d 1067, 1069-70 (9th Cir. 1975) (amnesia resulting from trauma incident to auto accident); Harding v. State, 5 Md. App. 230, 246 A.2d 303, 311-12 (girl who was shot and raped could not recall crime), *cert. denied*, 395 U.S. 949 (1968); H. SPIEGEL & D. SPIEGEL, *supra* note 23, at 296-97 (insurance company settled in auto accident when boy under hypnosis recalled wreck killing father).

Crime victims, especially in the more violent offenses, often suffer from amnesia or repression. This is a natural defense reaction allowing the victim to avoid emotionally disturbing memories. M. REISER, *supra* note 4, at 115-16.

[53] *See* M. TEITELBAUM, *supra* note 13, at 141-42 (memory recall through hypnosis by regressing subject to time of incident). Under hypnosis, memory involving imagery systems (as opposed to verbal systems) may be retrieved as originally viewed. M. REISER, *supra* note 4, at 114. As a result, the victim may be able to recall minute details of the event. *See, e.g.*, H. ARONS, *supra* note 4, at 39-48 (using hypnosis to obtain license plate numbers).

the results of the hypnotic interview, although precautions can be taken to reduce the likelihood of distortion occurring.[54]

First, the hypnotic subject may be the source of inaccuracy. He may confabulate,[55] have memory distortions,[56] or feign the depth of hypnosis and lie.[57] The subject's subsequent testimony, therefore, will be confabulated, distorted, or false to the same extent. The likelihood of confabulation or distortion occurring, however, is small.[58] Further, it should be noted that a witness who has never been hypnotized may give inaccurate testimony in exactly the same ways.[59] To prevent deception by outright lying, the hypnotist may employ one or more tests or safeguards.[60]

The hypnotist may also be a source of inaccuracy.[61] If he is predisposed to obtaining a particular result, or asks leading questions, he may influence the subject, who is in a highly suggestible state, to give false information.[62] The hypnotist may also obtain false answers if he is using unreliable techniques.[63] These problems are primarily the result of faulty methodology. Accordingly, many law enforcement agencies and courts have set requirements for acceptable hypnotic interviews that minimize the likelihood of the hypnotist influencing what the potential

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[54] *See* Comment, *Refreshing the Memory of a Witness Through Hypnosis*, *supra* note 8, at 278-79 (subject may be programmed to respond in identifiable manner when giving inaccurate information).

[55] Dellinger, *Investigative Hypnosis: Tapping Our Cerebral Memory Banks*, HUMAN BEHAVIOR, Apr., 1978, at 36-37. Confabulation occurs when a person fills in gaps in the memory with fabricated facts. Dilloff, *supra* note 5, at 5.

[56] Dilloff, *supra* note 5, at 5; *see* Diamond, *supra* note 8, at 314, 332-42 (subject cannot restrict memory only to facts).

[57] Dilloff, *supra* note 5, at 6; *see* Diamond, *supra* note 8, at 332-42 (impossible to determine whether subject is pretending to be hypnotized).

[58] One study found that in 151 cases in which follow-up information was available, 90.1% of the information obtained was later verified. M. REISER, *supra* note 4, at 184.

[59] This has been cited as a reason to find that previous hypnosis should be a consideration of weight, not admissibility. *See, e.g.*, United States v. Adams, 581 F.2d 193, 198 (9th Cir. 1978) (hypnosis affects only credibility); Clark v. State, 379 So. 2d 372, 375 (Fla. Dist. Ct. App. 1979) (same); People v. Smrekor, 68 Ill. App. 3d 379, 385 N.E.2d 848, 853 (1979) (same); State v. Temoney, 45 Md. App. 569, 414 A.2d 240, 244 (1980) (same).

[60] *See generally* Comment, *Hypnosis as a Defense Tactic*, *supra* note 8, at 700-02 (discussing safeguards to prevent deception).

[61] *See* Dilloff, *supra* note 5, at 7-8 (dangers associated with hypnotist).

[62] *Id.* at 4.

[63] *Id.* at 8. The author suggests that the hypnotist should use standardized procedures and remain unaware of desired responses. *Id.*

witness recalls.[64]

A final factor that may lead to inaccurate results is the physical environment in which the hypnosis takes place. If the subject is aware that he is being questioned in a police station, for example, he may be influenced to give responses consistent with the police's predisposition.[65] The danger of such influence occurring can be removed by questioning the subject in as neutral surroundings as possible or keeping influential information from him.[66]

III. Admissibility of Hypnotically-Induced Testimony

A. *Statutes*

In general, the issue of hypnosis has been left to the courts. Oregon is the only state having a substantive statute specifically dealing with investigative hypnosis.[67] The statute pertains to criminal proceedings only and requires that two conditions be met before a court admits testimony from a person previously hypnotized concerning the subject matter of the proposed testimony.[68] First, the hypnosis procedure must be recorded,[69] and,

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[64] *See* notes 88, 100 and accompanying text *infra* (safeguards used in courts).

The FBI's policy basically states that the FBI is to use hypnosis only in select cases. This would include bank robbery where force is used or a large amount of money is involved, kidnapping, extortion, and crimes of violence that occur where the FBI has jurisdiction. Hypnosis is confined to use with key witnesses or victims of crimes only. No one who has the potential of becoming a suspect or subject in a case is to be hypnotized for any reason.

The FBI uses only highly qualified hypnotists. The use of hypnosis must be discussed with the U.S. Attorney and his permission obtained. The U.S. Attorney must then obtain written permission from the Assistant Attorney General of the Criminal Division, U.S. Department of Justice. The current policy also states that no agent may participate in a hypnotic interview without written permission from the Attorney General. Further, the hypnotic interview must be recorded in its entirety, either by audiotape or videotape, with videotape being the preferred method. FBI Law Enforcement Bull. Jan., 1980 at 5-8.

[65] In Harding v. State, 5 Md. App. 230, 246 A.2d 302 (Ct. Spec. App. 1968), *cert. denied*, 395 U.S. 949 (1969), the police interviewed the witness in a police barracks. 246 A.2d at 308. Despite the apparent danger of suggestion, the court accepted testimony from the witness. *Id.* at 312.

[66] Dilloff, *supra* note 5, at 8.

[67] The statute is codified at Or. Rev. Stat. §§ 136.675-.685, .695 (1979).

[68] Or. Rev. Stat. § 136.675 provides:

> If either prosecution or defense in any criminal proceeding in the state of

second, the recording must be made available to the other party or parties.[70] The statute also requires that, in certain instances, the prospective subject must receive warnings about hypnosis, be informed he is free to refuse hypnosis,[71] and be told he may have the hypnosis procedure performed by a medical doctor or psychologist.[72]

There is no federal statute dealing with the subject, although the rules of evidence for courts-martial do exclude certain evidence related to hypnosis.[73]

Oregon intends to offer the testimony of any person, including the defendant, who has been subjected to hypnosis, mesmerism or any other form of the exertion of will power or the power of suggestion which is intended to or results in a state of trance, sleep or entire or partial unconsciousness relating to the subject matter of the proposed testimony, performed by any person, it shall be a condition of the use of such testimony that the entire procedure be recorded either on videotape or any mechanical recording device. The unabridged videotape or mechanical recording shall be made available to the other party or parties in accordance with ORS 135.805-135.990.

[69] OR. REV. STAT. § 136.675. The statute requires that the entire hypnosis procedure be recorded on videotape or any other mechanical recording device. *Id.*

[70] *Id.* The entire unabridged recording must be made available to the opposing party. *Id.*

[71] *Id.* § 136.685. The statute provides:

(1) No person employed or engaged in any capacity by or on behalf of any state or local law enforcement agency shall use upon another person any form of hypnotism, mesmerism or any other form of the exertion of will power or the power of suggestion which is intended to or results in a state of trance, sleep or entire or partial unconsciousness without first explaining to the intended subject that:

(a) He is free to refuse to be subject to the processes delineated in this Section;

(b) There is a risk of psychological side effects resulting from the process;

(c) If he agrees to be subject to such processes, it is possible that the process will reveal emotions or information of which he is not consciously aware and which he may wish to keep private; and

(d) He may request that the process be conducted by a licensed medical doctor or a licensed psychologist, at no cost to himself.

(2) In the event that the prospective subject refuses to consent, none of the processes delineated in Subsection (1) of this Section shall be used upon that person.

[72] *Id.*

[73] MANUAL FOR COURTS-MARTIAL ¶ 142(e) (1969).

B. Case Law

The question of the use of hypnosis as an investigative aid was first considered in *People v. Ebanks*[74] in 1897. In that case, the defense attempted to introduce testimony from an expert witness who had hypnotized the defendant.[75] The defendant had denied his guilt while in the hypnotic trance.[76] The court refused to admit the testimony, stating that the law of the United States did not recognize hypnotism.[77]

For sixty years, *Ebanks* remained the law. Cases involving witnesses or others influenced by hypnosis continued to be litigated and appealed to no avail.[78] In 1959, the landmark decision in *Cornell v. Superior Court*[79] opened the door to the use of hypnosis. The court in *Cornell* held that a criminal defendant has a right to be examined by his own counsel with the aid of a hypnotist, to assist in preparing his defense.[80] Subsequently, defendants were allowed to use hypnotic interviews for a variety of purposes, the most extreme example occurring in *State v. Nebb*,[81] where the defendant was hypnotized in court and testified while under hypnosis.[82]

When courts have faced the question of whether to admit testimony from a witness, other than the defendant in a criminal case, whose memory has been refreshed by hypnosis, they have

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[74] 117 Cal. 652, 49 P. 1049 (1897). In a trial for murder, defendant claimed to have been intoxicated at the time of the incident and to have no memory of its occurrence. 49 P. at 1051.

[75] 49 P. at 1053.

[76] *Id.*

[77] *Id.* The court stated that hypnosis was an illegal defense. *Id.*

[78] *See, e.g.*, State v. Pusch, 77 N.D. 860, 46 N.W.2d 508, 522 (1950) (statements made while in hypnotic trance clearly inadmissible); State *ex rel.* Sheppard v. Koblentz, 174 Ohio St. 120, 187 N.E.2d 40, 42 (1962) (denial of prisoner's request to be hypnotized not abuse of discretion).

[79] 52 Cal. 2d 99, 338 P.2d 447 (1959).

[80] 338 P.2d at 449. *Cornell* was not the first decision to allow use of hypnosis in a case. Hypnosis was an issue in State v. Exum, 138 N.C. 599, 50 S.E. 283 (1905). In that case, a wife was permitted to testify on behalf of her husband, the accused, and the fact that he previously had hypnotized her on several occasions only bore on her credibility. 50 S.E. at 285-86.

[81] No. 39,540 (Ohio Com. Pl., Franklin County, May 28, 1962) *discussed in* Teitelbaum, *supra* note 8, at 206.

[82] No. 39,540 (Ohio Com. Pl., Franklin County, May 28, 1962) *discussed in* Teitelbaum, *supra* note 8, at 208.

generally decided in favor of admissibility.[83] The fact that a wit-

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[83] Annot., *supra* note 8, at 446; *see, e.g.*, United States v. Awkard, 597 F.2d 667, 669 (9th Cir.) (witness, one of several inmates who stabbed victim, allowed use of pretrial hypnosis to refresh recollection), *cert. denied*, 444 U.S. 885 (1979); United States v. Adams, 581 F.2d 193, 194 (9th Cir.) (eyewitness' post-hypnosis statement regarding a murder and robbery is admissible), *cert. denied*, 439 U.S. 1006 (1978); Kline v. Ford Motor Co., 523 F.2d 1067, 1070 (9th Cir. 1978) (allowed testimony of witness, suffering from amnesia, who had undergone pretrial hypnosis); Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509-10 (9th Cir. 1974) (helicopter passenger, sole survivor of crash, allowed to testify from hypnotically-refreshed memory of event that occurred four years previous to trial); United States v. Narciso, 446 F. Supp. 252, 282 (E.D. Mich. 1977) (hypnotic recollection of elderly alcoholic patient ruled admissible); Clark v. State, 379 So. 2d 372, 374-75 (Fla. Dist. Ct. App. 1979) (victim's identification of defendant allowed from hypnotically-refreshed memory); Creamer v. State, 232 Ga. 136, 205 S.E.2d 240, 241-42 (1974) (hypnotic subject allowed to testify from refreshed memory); People v. Smrekor, 68 Ill. App. 3d 379, 385 N.E.2d 848, 852-53 (1979) (murder witness' identification of defendant was not rendered inadmissible by her hypnosis prior to identification); State v. McQueen, 295 N.C. 96, 244 S.E.2d 414, 427-28 (1978) (prostitute, only eyewitness, allowed to testify from hypnotically-refreshed memory of events occurring five years previous to trial); People v. Hughes, 99 Misc. 2d 863, 417 N.Y.S.2d 643, 648 (Onondaga County Ct. 1979) (rape victim's testimony, hypnotically-induced recollection, not inadmissible as a matter of law); State v. Jorgensen, 8 Or. App. 1, 492 P.2d 312, 315 (Ct. App. 1971) (hypnosis and sodium amytol used to refresh memory of witness to double murder not basis for disallowing testimony).

An opinion issued by the Mississippi Attorney General's office indicates that Mississippi would follow suit:

> The question has arisen as to the use of hypnosis in police work being legal in the State of Mississippi.
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> . . . .
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> On a nationwide basis, investigative use of hypnosis appears to be increasing. *See generally,* Admissibility of Hypnotic Evidence at Criminal Trial, 92 A.L.R.3d 442 (1979). Mississippi law does not appear explicitly to authorize or to condemn the practice as an investigative tool. As a device for ferreting out facts there is nothing inherently illegal about it. The only true yardstick of the utility of an investigative tool, however, is its ability to discover evidence admissible in a court of law. When measured by that standard, hypnosis does not fare well at all.
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> . . . .
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> Apparently the only use for hypnosis which the courts have sanctioned with consistency is its out-of-court use to refresh the recollections of a witness who subsequently testifies in-court, without the use of hypnotism, about what he remembers. Such a lack of memory normally arises either when a witness has been traumatized by an especially heinous crime which is then blocked from his memory or when the passage of time since the incident has been great, and memories are therefore clouded. Out-of-court hypnosis can then be used to refresh the witness's memory. *State v. McQueen,* 244 S.E.2d 414 (N.C. 1978).
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> . . . .

ness testifies to events recalled only after he has been hypnotized has been held to be a matter of credibility and not one of admissibility.[84] In admitting such testimony, however, courts have been careful to distinguish testimony from a witness' present memory, which has previously been hypnotically-refreshed, from testimony about out-of-court statements made by the subject while under hypnosis.[85] The latter has generally been excluded.[86] The courts admitting hypnotically-induced testimony have been aware of the dangers involved.[87] Instead of excluding

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> In Mississippi, therefore, hypnosis is a valid investigative tool of limited efficacy. As with any investigative tool, misuse by the police can result in liability for the policeman and, under certain circumstances, for the city as well. The potential for liability for misuse of hypnosis is heightened when the practitioner is not professionally qualified as a psychologist, psychiatrist or medical doctor. *See* Hypnosis in the Courtroom, American Medical News, November 24, 1978.
>
> It is the opinion of this office that hypnosis as an investigative tool is valid and that public and personal liability for its misuse is possible, just as it is possible for the misuse of any police tool.

Letter from J. Stephen Wright, Spec. Ass't Atty. Gen. to W.E. Felts, City Clerk, City of Indianola, Mississippi (March 7, 1980).

[84] *See* cases cited in note 59 *supra.*

[85] *Compare* State v. McQueen, 295 N.C. 96, 244 S.E.2d 414, 429 (1978) (hypnotically-refreshed testimony of witness as to present memory admissible) *with* Greenfield v. Commonwealth, 214 Va. 710, 204 S.E.2d 414, 419 (1974) (hypnotic evidence in form of subject testifying under hypnosis or another testifying as to what subject said not admissible).

[86] Annot., *supra* note 8, at 446; *see, e.g.,* Rodriguez v. State, 327 So. 2d 903, 904 (Fla. Dist. Ct. App. 1976) (statements made while witness under hypnosis not admissible); Emmett v. State, 232 Ga. 110, 205 S.E.2d 231, 235 (1974) (same); Creamer v. State, 232 Ga. 136, 205 S.E.2d 240, 241 (1974) (same); State v. Harris, 241 Or. 224, 405 P.2d 492, 498 (1965) (same); *cf.* State v. Pusch, 77 N.D. 860, 46 N.W.2d 508, 521-22 (1950) (testimony concerning results of hypnotic examination not admissible to show truth of matter asserted); Jones v. State, 542 P.2d 1316, 1326 (Okla. Crim. App. 1975) (hypnotist could testify about similarity between witness' statements at trial and under hypnosis, but not specific replies). *But cf.* United States v. Lechoco, 542 F.2d 84, 89 n.6 (D.C. Cir. 1976) (statements made to psychiatrist during treatment admissible under hearsay exception).

[87] The court in Harding v. State, 5 Md. App. 230, 246 A.2d 302 (Ct. Spec. App. 1968), allowed hypnotically-induced testimony even though "fancy can be mingled with fact in some cases." 246 A.2d at 312. Again, in People v. Hughes, 99 Misc. 2d 863, 417 N.Y.S.2d 643 (Onondaga County Ct. 1979), the court allowed the testimony, admitting that "hypnotic age regression . . . produces a ' . . . tendency to confabulate, [i.e.,] to fill in those aspects which the individual cannot remember in an effort to comply with the suggestions of the hypnotist.' " 417 N.Y.S.2d at 646.

The court in People v. Smrekor, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979), stated that:

the testimony, they have chosen to set guidelines that must be met before such testimony is admitted.[88]

Thus, in *United States v. Adams*,[89] the Ninth Circuit Court of Appeals emphasized the importance of exercising great care in using hypnosis to refresh memory.[90] While reaffirming that hypnosis is relevant to credibility but not admissibility,[91] the court

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> [T]he use of hypnosis is not without problems. 'Asking a patient to recall only real events, or to verify aspects of the material as true or false, reduces but does not remove the element of fantasy' . . . . The hypnotized subject is also subject to suggestion by the hypnotist. Despite these infirmities, the courts in *Harding, Jorgensen* and *Narciso* ruled the testimony of the formerly hypnotized subject to be admissible . . . .

385 N.E.2d at 853; *see* note 83 *supra*. Recognizing the hazards involved with hypnosis, the court in Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975), concluded that "[a]lthough the device by which recollection was refreshed is unusual, in legal effect her situation is not different from that of a witness who claims that his recollection of an event that he could not earlier remember was revived when he thereafter read a particular document." *Id.* at 1069-70.

[88] One court stated that "evidence elicited through hypnosis can be valuable" if there is "general acceptance in the scientific community and adequate procedural safeguards to insure reliability." People v. Hughes, 99 Misc. 863, 417 N.Y.S.2d 643, 648 (Onondaga County Ct. 1979). The court listed the following safeguards:

> (1) Only a psychiatrist or psychologist with special training in the use of hypnosis should carry it out and, to minimize bias and suggestiveness, the hypnotist should be given, in writing, only such facts as are necessary to conduct the session. (2) *All* contact between the hypnotist and his subject should be videotaped. (3) No one other than the hypnotist and the subject should be present because of the danger that observers will inadvertently communicate to the subject. (4) Prior interrogations should be tape recorded so that it is possible to document that the witness has not been cued, explicitly or implicitly, about information which is then reported for apparently the first time during hypnosis.

417 N.Y.S.2d at 647. In Harding v. State, 5 Md. App. 230, 246 A.2d 302 (Ct. Spec. App. 1968), the court affirmed a conviction, holding that the hypnotically-refreshed testimony was sufficient to support the jury's verdict. 246 A.2d at 312. In so holding, the court noted that "(1) the hypnosis procedure was fully exposed in the evidence; (2) the man who induced the hypnosis was a professional psychologist and gave his opinion that there was no reason to doubt the truth of the witness' statement; (3) there was sufficient corroboration of the witness' testimony . . . ." *Id.*

[89] 581 F.2d 193 (9th Cir. 1978).

[90] *Id.* at 198-99. The court stated that "[g]reat care must be exercised to insure that statements after hypnosis are the product of the subject's own recollections, rather than of recall tainted by suggestions received while under hypnosis." *Id.*

[91] *Id.* at 198. The court previously had so held in a civil case, Kline v. Ford Motor Co., 523 F.2d 1067, 1069 (9th Cir. 1975). *Adams* was the first time the issue had been raised before the Ninth Circuit in the criminal context. 581 F.2d at 198.

suggested that minimum standards must be met.[92] The court indicated it would prefer a videotape or tape recording of the entire hypnosis procedure, but would accept a complete stenographic record that included the identity of persons present, questions asked, and responses given.[93] The court's disapproving reference to the fact that the hypnotist in *Adams* was "uncertified"[94] indicates a preference for better credentials, although no specific recommendations in this regard were given.

In *United States v. Miller*,[95] the Second Circuit Court of Appeals required a new trial where the government failed to disclose that its principal witness was testifying from a hypnotically-refreshed memory.[96] At the same time, the court pointedly remarked, "Nothing in [this] decision is to be taken as implying any view that [the witness'] hypnosis disqualifies him from testifying on a new trial."[97] The court's primary concern was that the effect of the hypnosis on the credibility of the witness was an issue that should have been presented to the jury.[98]

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[92] The court stated, "[W]e do not approve of the hypnosis methods used here . . . ." 581 F.2d at 199. The court, however, did not reject the testimony on that ground, since the objection made in this case was to the reliability of the testimony given by one who had been hypnotized, rather than to the adequacy of the foundation laid. *Id.*

[93] *Id.* at 199 n.12.

[94] *Id.* at 199 n.13. At least one commentator has suggested that only medical professionals or licensed psychologists be accepted as hypnotists by the courts. Dilloff, *supra* note 5, at 7. There are reasons, however, that the non-medical, investigative hypnotist might be preferable. First, the well-trained forensic hypnotist is better able to guard against leading questions or suggestibility during hypnotic sessions. He has already learned to avoid the "leading-question syndrome." The hypno-therapist, however, is quite likely to use suggestive discourse as a dimension of his normal inquiries with his patient. Second, a forensic hypnotist is familiar with the elements necessary to prove a crime and can focus the hypnotic interview accordingly. *See generally* M. REISER, *supra* note 4, at 75-77 (differences in qualifications of investigative and therapeutic hypnotist).

[95] 411 F.2d 825 (2d Cir. 1969).

[96] *Id.* at 832-33.

[97] *Id.* at 832 n.15.

[98] *Id.* at 832. The court, in requiring a new trial, stated that:

> [T]he hypnosis had arguably placed at least some obstacle in the way of one of the most valuable protections accorded [the defendant] by the Sixth Amendment—the possibility that the sanctity of the oath and effective cross-examination might lead [the witness] to recant his identification or at least admit doubt. The defense could and very likely would have made this the capstone of its attack . . . .

Id.

State courts that have admitted hypnotically-induced testimony likewise have considered the fact of hypnosis to be an issue of credibility[99] and have constructed guidelines for its use.[100]

In *State v. Jorgensen,*[101] testimony was permitted from a woman whose memory was restored through hypnosis and sodium amytol.[102] A key factor in the court's decision was the fact that the witness was subjected to a lengthy and detailed cross-examination in open court.[103] The court noted that the hypnotic interviews were conducted by duly licensed physicians,[104] and that a tape of the interview was available and was played to the jury.[105] Under these circumstances, the court held the fact of the witness' hypnosis went to the weight and not the admissibility of

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[99] *See, e.g.,* Emmett v. State, 232 Ga. 110, 205 S.E.2d 231, 235 (1974) (mere fact of hypnosis did not taint testimony so as to render it inadmissible); People v. Hughes, 99 Misc. 2d 863, 417 N.Y.S.2d 643, 648 (Onondaga County Ct. 1979) (testimony consisting of hypnotically-induced recollection not inadmissible as matter of law).

[100] In People v. Lewis, 103 Misc. 2d 881, 427 N.Y.S.2d 177 (N.Y. County Ct. 1980), the court enumerated the following guidelines: (1) the hypnotic session should be administered by a mental health expert trained in hypnosis; (2) the hypnotist should be informed by written memorandum of only those facts of the case that would be essential for questioning the subject; (3) the hypnotist should be a neutral party, unconnected with either the prosecution or the defense; (4) all contact between the hypnotist and the subject should be videotaped; (5) no one connected with either the prosecution or the defense should be present during the session; (6) prior to the session the subject should be examined by a mental health professional to assure that the subject is free from any physical or mental disorder and understands the procedure he will undergo; (7) prior to hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject believes them to be; (8) the hypnotist should strive to avoid adding any elements to the subject's testimony and should take care not to convey any cues before, during, or after the procedure; (9) evidence tending to corroborate or to challenge the statements made during the trance should be considered. 427 N.Y.S.2d at 179.

[101] 8 Or. App. 1, 492 P.2d 312 (1971).

[102] 492 P.2d at 315. According to psychiatric testimony offered by the state, the witness suffered a loss of memory as the result of trauma produced by her involvement in the events surrounding the murder of a young couple. In her testimony, after her memory had been restored, the witness revealed that she was with the defendant and the other two men accused of the murders on the night of the slaying. Although she did not see the actual slayings, she provided details of a meeting and ensuing fight between the defendants and the male victim, and the defendants' subsequent abduction of the female victim. *Id.*

[103] *Id.* One commentator has stated that the best method of bringing the fact of hypnosis before the trier of fact is to permit the cross-examiner to raise the issue for the purpose of impeaching the witness. Dilloff, *supra* note 5, at 21-22.

[104] 492 P.2d at 315.

[105] *Id.* The tape was played to the jury at the request of defense counsel. *Id.*

her testimony.[106]

Similarly, in *State v. McQueen*,[107] the court allowed testimony from a prostitute who had witnessed the murders of her co-workers five years earlier.[108] Until a few weeks prior to trial, she was unable to remember the killings.[109] After undergoing hypnosis at her own request, the witness recalled details of the murders and testified from her refreshed memory.[110] The defense was given a tape of the procedure shortly before she testified.[111] The court found her hypnosis affected the credibility but not the admissibility of her testimony.[112]

Not all states considering the issue of the hypnotically-refreshed memory have admitted such testimony. In a recent Arizona case,[113] the court found the lower court had erred in permitting hypnotically-induced testimony.[114] The court granted

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[106] *Id.*

[107] 295 N.C. 96, 244 S.E.2d 414 (1978).

[108] *Id.* at 122, 244 S.E.2d at 429. The witness testified that she saw the defendant kill both the operator and an employee at the house of prostitution where the witness was employed. *Id.* at 100, 244 S.E.2d at 417. The witness, who had formerly worked in a house of prostitution operated by the defendant, then left the scene of the crime with him. After traveling across the country together, they separated upon being advised of the circulation of a police flier bearing their pictures. The witness subsequently surrendered to authorities. *Id.* at 99-101, 244 S.E.2d at 416-17.

[109] The witness stated that she blamed herself for the murders, and thus attempted to block the incident from her mind. As to her memory of the crime prior to the hypnotic session, she stated, "[S]ometimes I knew I saw him kill them and sometimes I really knew I hadn't seen him; I just know, I couldn't remember." *Id.* at 101, 244 S.E.2d at 417.

[110] *Id.*, 244 S.E.2d at 417. "When I was under hypnosis I was able to actually go back to that day five years ago and just relive the whole morning and see the whole day like it was right now, everything was fresh." *Id.*, 244 S.E.2d at 417.

[111] The tape was presented to the defense counsel the day before the witness testified. The tape was not offered into evidence. The defense neither cross-examined the witness regarding the hypnosis procedure nor called the hypnotist as a witness at the trial. *Id.*, 244 S.E.2d at 417-18.

[112] *Id.* at 119, 244 S.E.2d at 427. The court noted that the jury had been fully advised that the witness had been hypnotized. The court then compared the method of refreshing a witness' memory by hypnosis with other methods of refreshing recollection, such as the reading of documents. The court found no discernible difference in the methods and held that the credibility of the witness' refreshed testimony is a matter for the jury. *Id.*, 244 S.E.2d at 427.

[113] State v. LaMountain, 125 Ariz. 547, 611 P.2d 551 (1980).

[114] 611 P.2d at 555. The defendant was convicted of first degree rape, lewd and lascivious acts, and attempted lewd and lascivious acts. *Id.* at 552. At trial, a previous alleged victim of the defendant at the same laundromat was able to identify the defendant only after hypnosis. Also, an eyewitness to the same incident was able to identify the

that hypnosis was useful for investigative purposes[115] but concluded that the state of the science was not sufficiently advanced to allow the admission of testimony developed using hypnosis.[116]

Similarly, the Minnesota Supreme Court recently refused to allow hypnotically-induced testimony,[117] fearing that the susceptibility of the subject and possibility of even inadvertent suggestion would produce results that would make credibility impossible to evaluate.[118]

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defendant only after hypnosis. *Id.* at 553.

[115] *Id.* at 555.

[116] *Id.* The Arizona court recently affirmed its position with regard to hypno-induced testimony in State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981). In that case the court reasoned that since hypnosis is a scientific procedure, it must meet the standard for admission of scientific evidence, which is general acceptance of the method or principle in the particular field. 624 P.2d at 1279. Finding that hypnosis had not become generally accepted as a means of improving memory effectiveness, the court held that the testimony of a witness who has been hypnotized should be excluded. *Id.*

A similar case is Rodriguez v. State, 327 So. 2d 903 (Fla. Dist. Ct. App. 1976). There the defense sought to introduce the testimony of the hypnotist regarding statements made by the defendant while he was under hypnosis. *Id.* at 904. The court found that hypnotic evidence did not meet the criterion of reasonable demonstrability necessary for the admission of scientific evidence, and, thus, exclusion was proper. *Id.*

The standard for the admissibility of scientific evidence was established in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). In excluding expert testimony concerning the use of a systolic blood test, the court stated that scientific evidence is only admissible when it has gained general acceptance in the particular field. *Id.* at 1014.

It seems reasonable to apply this standard in a case, such as *Rodriguez*, where statements made during hypnosis are the subject of the testimony. The standard does not appear to be applicable where the witness is himself testifying from a refreshed memory. In the latter instance, it is not the result of a scientific test that is being introduced. Rather the witness' present memory—now unimpeded by psychological barriers, removed through hypnosis—is the source of the testimony.

For a general discussion of the applicability of the *Frye* test to hypno-induced testimony, see Note, *Safeguards Against Suggestiveness: A Means For Admissibility of Hypno-Induced Testimony*, 38 WASH. & LEE L. REV. 197 (1981).

[117] State v. Mack, 292 N.W.2d 764, 772 (Minn. 1980). The victim underwent hypnosis to restore her memory of an alleged assault. The victim could not remember the event because she was intoxicated at the time. *Id.* at 765.

[118] *Id.* at 767. The court tested the admissibility of hypno-induced testimony by the scientific admissibility standard set down in Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). 292 N.W.2d at 771. Relying on expert testimony that, due to several factors, it was impossible to tell if the memory retrieved by hypnosis was accurate, the court held that the *Frye* test had not been met. *Id.* at 768-71. For a discussion of the accuracy of hypno-induced testimony, see notes 54 through 66 and accompanying text *supra*. For a discussion of the applicability of the *Frye* test to hypno-induced testimony, see note 116 *supra*.

In a case decided in 1981,[119] the New Jersey Supreme Court appeared sympathetic to the reservations expressed by the Arizona and Minnesota courts.[120] It held, however, that a witness in a criminal trial may testify from a refreshed memory if certain safeguards are met.[121] The court first noted that hypnotically-refreshed testimony must meet the standard for scientific evidence, since the credibility of the results depends upon the scientific reliability of the procedure.[122] It mentioned the dangers of inaccuracy accompanying hypnosis[123] but saw no reason to enforce a blanket exclusion "of evidence that is as trustworthy as other eyewitness testimony."[124] The New Jersey court was specific in its requirements for the admission of hypnotically-refreshed testimony in a criminal trial. The standard of admissibility is whether "the trial court finds that the use of hypnosis in the particular case was reasonably likely to result in recall comparable in accuracy to normal human memory."[125]

The trial court must further consider whether or not the kind of memory loss involved is one for which the use of hypnosis is appropriate.[126] If it finds hypnosis is appropriate, the court

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[119] State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981).

[120] *See* 432 A.2d at 91 (discussing difficulties with hypnotic evidence).

[121] *Id.* at 92.

[122] *Id.* at 91.

[123] *Id.* at 92-94. The court noted several features of hypnosis that made it an unreliable method of obtaining accurate recall. The court first noted that during hypnosis the subject was extremely vulnerable to suggestion and that the subject's tendency was to shape the recall in response to the intentional or inadvertent cues from the hypnotist. The second problem mentioned was the loss of critical judgment by the subject, whereby the subject becomes more willing to speculate and respond to questions with confidence than he or she would have under normal circumstances. Finally, the court found the most distressing problem contributing to the unreliability of hypno-induced memory was the tendency of the subject to confound memories evoked under hypnosis with prior recall. *Id.*

[124] *Id.* at 94. The court noted that several psychological studies on the reliability of eyewitness testimony revealed problems similar to those involved with hypnosis. *Id.* at 94-95. *See generally* Kubie, *Implications for Legal Procedure of the Fallibility of Human Memory*, 108 U. PA. L. REV. 59 (1959) (problems with eyewitness testimony).

[125] 432 A.2d at 95. The court based this standard on expert testimony that, in appropriate cases and when properly conducted, the use of hypnosis to refresh memory reveals information as reliable as that obtained through ordinary recall. *Id.*

[126] *Id.* The court noted that the subject's lack of memory was an important factor in evaluating the reliability of hypnosis in restoring recall. Relying on expert authority, the court stated that hypnosis is reasonably reliable in reviving normal recall where there is

must then evaluate whether the procedures followed were reasonably reliable.[127] To provide an adequate record for evaluating the reliability of the hypnotic procedure and to ensure the minimum level of reliability, the court adopted a set of requirements that must be met before hypnotic evidence will be admitted:

> (1) A psychiatrist or psychologist experienced in the use of hypnosis must conduct the session. (2) The professional conducting the hypnotic session should be independent of and not regularly employed by the prosecutor, investigator or defense. (3) Any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded, either in writing or another suitable form. (4) Before inducing hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them. (5) All contacts between the hypnotist and subject must be recorded. The use of videotape, the only effective record of visual cues, is strongly encouraged but not mandatory. (6) Only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and the post-hypnotic interview.[128]

IV. CONCLUSION

Mississippi will soon be faced with the question of the admissibility of hypnotically-induced testimony. It may be faced with admissibility problems concerning other types of hypnotic

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a pathological reason for the witness' inability to remember. The court further added that the accuracy of recall diminished if hypnosis was used to refresh a witness' memory concerning details where there was no recollection at all, or if used to verify one of several conflicting accounts. *Id.* at 95-96 (citing Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL AND EXPERIMENTAL HYPNOSIS 311, 324-25, 332 (1979)).

The court mentioned that another factor to be considered in determining the reliability of the hypno-induced memory was whether the witness had any discernible motivation for not remembering, or for recalling a particular version of events. The court noted that experts in the field had found that the possibility of creating self-serving fantasy in this situation was significant. *Id.* at 96 (citing Orne, *supra*, at 314-15).

[127] 432 A.2d at 96. The court listed several factors to consider in this regard, including the nature of the questioning, any cues or suggestions given, and the susceptibility of the subject to hypnosis. *Id.*

[128] *Id.* at 96-97. The court also found that the party seeking to introduce the hypnotically-refreshed testimony had the burden of establishing its admissibility by clear and convincing evidence. *Id.* at 197.

evidence as well. Any decision should be reached only after careful study of the direction taken by other jurisdictions and the available information concerning hypnosis.

It is clear that minimum safeguards must be established. Given these, however, Mississippi courts should not be reluctant to follow the majority of courts in admitting testimony from a witness with a hypnotically-refreshed memory. The following are suggested as general guidelines to adopt:

> (1) The entire procedure of hypnosis and the hypnotic interview should be tape recorded or videotaped, if possible;[129]
>
> (2) The hypnotist should be impartial and be able to qualify as an "expert" under the court's standards;[130]
>
> (3) The opposing party or parties should have full access, prior to trial, to the recording of the hypnotic interview;[131]
>
> (4) The opponent(s) must have free rein to cross-examine the hypnotically-induced witness and/or the hypnotist concerning the witness' memory and the particular procedure used to refresh it;[132]
>
> (5) Corroborating testimony or physical evidence should always be used to substantiate the hypnotically-enhanced statements made by witnesses or victims.[133]

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[129] Videotaping the hypnotic session combined with access of opposing counsel to the tape and his ability to cross-examine the hypnotist would eliminate many of the dangers that have been noted. *See* notes 54 through 66 and accompanying text *supra*. A videotape would reveal parties present, any physical or nonverbal cueing that might occur, as well as the questions asked. Any elements that create unreliability or an increased likelihood of inaccuracy could then be brought to the jury's attention through cross-examination of the hypnotist.

[130] Both medical professionals and investigative hypnotists could meet this standard. This insistence of some courts that the hypnotist be a medical doctor or psychologist is misguided. The major concerns are that the hypnotic technique be reliable and that the questions asked not be suggestive. Skill in these matters relates to one's expertise in hypnosis and not to medical training. *See* note 94 *supra*.

[131] *See* United States v. Miller, 411 F.2d 825, 830-31 (2d Cir. 1969) (duty to disclose pretrial hypnosis).

[132] *Id.*

[133] *See* People v. Lewis, 103 Misc. 2d 881, 427 N.Y.S.2d 177, 179 (N.Y. County Ct. 1980) (evidence tending to corroborate or to challenge statements made during trance should be considered).

As other types of hypnotic evidence become issues, other guidelines or restrictions might be added. In doing so, the major consideration should be to minimize the possibilities of inaccuracy while allowing the trier of fact to benefit from the investigative value of a remarkable technique.

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR and the UNIVERSITY of MISSISSIPPI SCHOOL OF LAW

VOLUME 51 SEPTEMBER-DECEMBER 1981 NUMBER 4

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COMMENTS

PARTIES ENTITLED TO INVOKE THE EXCLUSIONARY RULE: FOURTH AMENDMENT STANDING IN TRANSITION

The exclusionary rule is a judicially-created principle[1] which serves to ensure that proper deference is accorded to the fourth amendment's guarantee of freedom from unreasonable searches and seizures. By requiring illegally obtained evidence to be excluded from trial, the rule is said to act as a deterrent to constitutional violations by law enforcement officials and to promote the integrity of the judicial system.[2] However, the widespread application of the exclusionary rule

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[1] The question of the inadmissibility of illegally seized evidence was first raised in Boyd v. United States, 116 U.S. 616, 630 (1886). *See* Nelson, *Search and Seizure: Boyd v. United States*, 9 A.B.A.J. 773, 775 (1923) (discussion of Justice Bradley's suggestion that the fourth amendment should exclude certain evidence). Slightly over a quarter of a century later, the Supreme Court, in Weeks v. United States, 232 U.S. 383 (1914), established the exclusionary rule to require evidence obtained in violation of an individual's fourth amendment rights to be suppressed. The rule was applicable, however, only to federal criminal cases. *Id.* at 392. In Wolf v. Colorado, 388 U.S. 25, 28-33 (1949), the Supreme Court held that the fourteenth amendment due process clause did not require that state courts adopt the *Weeks* exclusionary rule. However, twelve years later, in Mapp v. Ohio, 367 U.S. 643 (1961), the Court overruled *Wolf* and imposed the exclusionary rule on the states. The Court thus closed "the only courtroom door remaining open to evidence secured by official lawlessness." *Id.* at 654-55.

[2] The Court in Elkins v. United States, 364 U.S. 206 (1960) emphasized that while the preservation of judicial integrity was an important consideration, *id.* at 222-23, the primary purpose of the exlcusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.* at 217. In subsequent decisions, members of the Court have disagreed sharply on which considerations accurately reflect the purpose of the rule. *Compare* United States v. Payner, 447 U.S. 727, 735 n.8 (1980) (exclusionary rule serves dual purposes of deterrence and protection of judicial integrity) *and* United States v. Calandra, 414 U.S. 338, 357-60 (1974) (Brennan, J., dissenting) (primary purpose of rule is to preserve judicial integrity, not deter police misconduct) *with* Stone v. Powell, 428 U.S. 465, 484-85 (1976) (concern for judicial integrity is of only limited value as justification for exclusionary rule) *and* United States v. Calandra, 414 U.S. 338, 347-48 (1974) (rule operates to deter future misconduct and not to redress injury to victim of unconstitutional search).

is limited by the fact that a party cannot claim a protective right under the Constitution unless he is a member of the class for whose benefit the constitutional protection was made.[3] In essence, this means that only a defendant who has had his own constitutional rights violated is entitled to invoke the exclusionary rule to bar the admission of evidence.[4] This requirement traditionally has been called a rule of "standing" to raise a constitutional claim.[5] In the search and seizure area, the question of who is a victim of illegal police conduct and who thus has standing to challenge the illegal action is more complex than in other areas involving constitutional guarantees.[6] The United States Supreme

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[3] *E.g.*, Tileston v. Ullman, 318 U.S. 44, 46 (1943) (adverse interest which contesting party must show cannot be based on violation of rights of third party); Goldstein v. United States, 316 U.S. 114, 121 (1942) (general trend in fourth amendment area is to deny standing to those not victims of the unconstitutional action); New York *ex rel.* Hatch v. Reardon, 204 U.S. 152, 160 (1907) (party alleging the unconstitutionality of state tax law must belong to the class for whose sake the constitutional protection is given). The requirement of standing operates to augment the established policy of deciding constitutional questions only when absolutely necessary to the disposition of the case or controversy. Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 Nw. U.L. REV. 471, 472 (1952).

[4] Rule 41(e) of the Federal Rules of Criminal Procedure limits the ability to make a motion to suppress to a "person aggrieved by an unlawful search and seizure." The Court in Rakas v. Illinois, 439 U.S. 128 (1978), determined that this standard was no different from the constitutional standard of fourth amendment standing. *Id.* at 132 n.2. Jones v. United States, 362 U.S. 257 (1960), made it clear that in order to be "aggrieved," a person must have himself been a victim of a search and seizure, as opposed to one who claimed prejudice only through the use of evidence gathered through a search or seizure involving a third party. *Id.* at 261.

[5] The Supreme Court in Rakas v. Illinois, 439 U.S. 128 (1978), discarded "standing" as a theoretically separate analytical concept and determined that traditional standing requirements should henceforth be defined by reference to substantive fourth amendment law. *Id.* at 138-40. The term "standing" nonetheless continues to appear in some Court opinions. *E.g.*, United States v. Payner, 447 U.S. 727, 731-32 (1980); *id.* at 738, 742-43, 748 (Marshall, J., dissenting). Although this Comment continues to use the word "standing" in order to simplify the discussion of fourth amendment issues, proper terminology now requires a defendant to show that he has a legitimate expectation of privacy in the invaded area before being allowed to make a motion to suppress. *See* text accompanying notes 44 through 46 *infra*.

[6] For example, the general rule against vicarious assertion of constitutional rights is easily applied in the fifth amendment context of an illegally obtained confession; only the person who made the improperly obtained confession can seek to suppress it. If the confession implicates another party, it still may be introduced in evidence against him since no rights of the second party have been violated by virtue of the illegal treatment accorded the confessor. *Cf.* Wong Sun v. United States, 371 U.S. 471, 491-92 (1963) (defendant implicated by illegal seizure from and illegally obtained statement of others lacks standing to challenge the illegal action).

Court, in *Rakas v. Illinois*[7] and succeeding decisions,[8] has significantly limited the class of persons who may properly be regarded as victims of illegal action, thus dramatically altering the fourth amendment law of standing. This Comment will briefly examine the pre-*Rakas* law of standing and will then attempt to analyze the effect of the recent Supreme Court decisions on the rights accorded defendants under the fourth amendment.

I. The Requirement of Standing in Search and Seizure Cases

A. Why a Standing Requirement?

As noted, the Supreme Court traditionally has required that a party have a personal interest in a fourth amendment claim before that party can properly assert it. The personal interest must be derived from a violation of his own constitutional rights. However, the Court has determined that third party standing—allowing a party to contest the violation of another's constitutional rights—is not prohibited by the Constitution.[9] Consequently, numerous authorities have urged that vicarious assertion of constitutional rights should be allowed in the context of the exclusionary rule in order to effectively deter fourth amendment violations.[10] The most cogent arguments have usually advocated the adoption of a "target" theory whereby any criminal defendant at whom a search was directed would have standing to contest the

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[7] 439 U.S. 128 (1978); *see* notes 38 through 59 and accompanying text *infra*.

[8] Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980); United States v. Payner, 447 U.S. 727 (1980).

[9] Alderman v. United States, 394 U.S. 165, 174-76 (1969); Flast v. Cohen, 392 U.S. 83, 98, 99 n.20 (1968). In general, a state is free as a matter of its own law to impose greater restrictions on police activity than does the United States Supreme Court in its application of federal constitutional standards. Sibron v. New York, 392 U.S. 40, 60-61 (1968); Cooper v. California, 386 U.S. 58, 62 (1967). The New Jersey Supreme Court recently invoked this principle in refusing to adopt the United States Supreme Court's restrictive approach to fourth amendment standing. In State v. Alston, 87 N.J. 531, 436 A.2d 81 (1981), the New Jersey court decided to retain the standing rules applicable in that state before *Rakas v. Illinois*, thereby continuing to allow a party who has a proprietary, possessory, or participatory interest in either the place searched *or* the property seized to bring a motion to suppress. 436 A.2d at 89. The court also retained the "automatic standing" rule which the United States Supreme Court abandoned in United States v. Salvucci, 448 U.S 83, 95 (1980). 436 A.2d at 89-90. No support was offered, however, for the "target" theory or the "legitimately on the premises" test. *Id.* at 90 n.12.

[10] *See, e.g.*, Brown, *Standing To Object To An Unlawful Search and Seizure*, 1965 Wash. U.L.Q. 488, 517 (1965) (proposing adoption of target theory as effective means of deterring unlawful police conduct); Comment, *Standing to Contest Illegal Searches and Seizures*, 46 Miss. L.J. 147, 168 (1975) (same).

legality of the search.[11] The Supreme Court, in balancing the potential deterrent value of such a rule against the public interest in admitting all relevant evidence at trial,[12] has rejected any such attempts at permitting vicarious or derivative standing.[13] The Court's finding that vicarious standing is not prohibited by the Constitution leaves open, however, the possibility that state courts could grant such standing. Despite this possibility, only California[14] has adopted a standing provision more lenient than that formulated by the Supreme Court. The California Supreme Court has determined that effective deterrence of illegal police conduct can be accomplished only by extending the exclusionary rule to individuals who have no constitutional right to claim the benefit of the rule.[15] Similarly, the Model Code of Pre-Arraignment Procedure permits third party standing by allowing a motion to suppress to be made by a defendant, a member of his family, a co-conspirator, a business partner, or a co-resident.[16] Despite the commendable objective of such vicarious standing schemes,[17] policy considerations inherent in the exclusion of relevant evidence from the trier of fact in criminal cases have caused the vast majority of states to follow the

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[11] The target theory was squarely presented to the Supreme Court in Rakas v. Illinois, 439 U.S. 128 (1978), and was unequivocally rejected. The petitioners in *Rakas* pointed to language in Bumper v. North Carolina, 391 U.S. 543, 548 n.11 (1968), Jones v. United States, 362 U.S. 257, 261 (1960) and United States v. Jeffers, 342 U.S. 48, 54 (1951), as support for the target theory. 439 U.S. at 132-38.

Cases which have used a target analysis in deciding questions of standing include: United States v. Cobb, 432 F.2d 716, 719-20 (4th Cir. 1970); United States v. Rosenberg, 416 F.2d 680, 682 (7th Cir. 1969); State v. Hink, 6 Wash. App. 374, 492 P.2d 1053, 1055 (1972).

[12] *See* Rakas v. Illinois, 439 U.S. at 134 n.3, 137 (1978) (exclusion of evidence means the search for the truth at a trial is deflected); Alderman v. United States, 394 U.S. 165, 174-75 (1969) (benefit of added deterrence of illegal action is outweighed by excessive encroachment upon public interest in successful criminal prosecution).

[13] *See* note 11 *supra*. As an additional reason for the rejection of the target theory the Court noted the "substantial administrative difficulties" which the rule would entail. 439 U.S. at 136-37 (quoting Alderman v. United States, 394 U.S. 165, 188 n.1 (Harlan, J., concurring and dissenting)).

[14] *See* People v. Martin, 45 Cal. 2d 755, 290 P.2d 855, 857 (1955) (evidence obtained from illegal search and seizure cannot be introduced in any trial, regardless of standing of defendant). This decision permits a defendant to require exclusion of evidence obtained by violating the fourth amendment rights of another person.

[15] The court permitted vicarious standing on the ground that "the government must not be allowed to profit by its own wrong and thus [be] encouraged in the lawless enforcement of the law." 290 P.2d at 857.

[16] AMERICAN LAW INSTITUTE MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.1(5) (1974).

[17] *See* note 15 and accompanying test *supra*.

more restrictive position of the United States Supreme Court.[18] While the full effect of the Supreme Court's rejection of the target theory in *Rakas* is uncertain, the probability that state courts would now adopt such a theory would seem to be remote.

State legislative action is another possible means of permitting third party standing, albeit an equally unlikely one.[19] Thus, it is obvious that the boundaries drawn by the United States Supreme Court in the area of fourth amendment standing serve to set the standard for almost all lower courts, despite the availability of less restrictive alternatives. A look at the Court's decisions in the years before 1978 will serve to emphasize the dramatic change in the law of standing since that time.

B. The Concept of Standing Before Rakas

In *Jones v. United States*,[20] the Supreme Court clarified earlier standing decisions[21] by rejecting the view that an individual subjected to an unlawful search only had standing if he had some special property right in the premises. The Court in *Jones* held that one need only show that he was legitimately on the premises searched in order to obtain an interest sufficient to confer standing.[22] *Jones* also stated that one charged with a crime requiring proof of his possession of seized property had automatic standing to contest the legality of the seizure.[23] The automatic standing rule prevented a defendant from facing up to the "dilemma" of having to assert possession of an item in order to achieve standing, only to have this admission used against him by the

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[18] *See generally* Annot., 78 A.L.R.2d 246, 251-72 (1961) (surveying state court decisions). *But cf.* State v. Alston, 87 N.J. 531, 436 A.2d 81, 89-90 (1981) (refusal to adopt privacy analysis).

[19] *But see* State v. Culotta, 343 So. 2d 977, 981-83 (La. 1976), where the Louisiana Supreme Court broadly interpreted the newly revised article 1, section 5 of the Louisiana Constitution of 1974, as permitting a defendant to challenge searches against third parties when the defendant would be adversely affected by the fruits of the search. *See generally The Work of the Louisiana Appellate Courts for the 1976-1977 Term*, 38 LA. L. REV. 313, 516-20 (discussion of *Culotta* decision). *See also* note 97 *infra* (discussing potential impact of legislative and judicial action establishing privacy expectations).

[20] 362 U.S. 257 (1960). For a more extensive discussion of the standing decisions before *Rakas* and their impact on Mississippi case law, see Comment, *supra* note 10, at 150-66.

[21] *E.g.*, United States v. Jeffers, 342 U.S. 48, 54 (1951) (ownership or right to possession of premises is sufficient to confer standing).

[22] 362 U.S. at 267.

[23] *Id.* at 264.

prosecution in establishing its case.[24] Eight years later, in 1968, the Court, in *Simmons v. United States*,[25] set forth an additional rule which directly addressed the "dilemma" outlined in *Jones* and significantly undermined the need for automatic standing. The Court ruled that testimony by a defendant at a suppression hearing could not be admitted against him at trial on the issue of guilt.[26] Thus, a defendant may allege possession of an item at the suppression hearing, and, if the motion to suppress is denied, deny possession at trial without the possibility of his earlier testimony being used against him in the prosecution's case-in-chief.[27]

In *Katz v. United States*,[28] the Supreme Court redefined the nature of the interests protected by the fourth amendment in terms of privacy. The issue in *Katz* was whether the defendant, who had been subjected to warrantless electronic eavesdropping while in a public telephone booth, could properly be regarded as the victim of a search.[29] The Court held that fourth amendment protection extends beyond property lines to areas in which one has a reasonable expectation of freedom from governmental intrusion. Since the bugging of Katz' booth "violated the privacy upon which he justifiably relied," the Court found the deprivation of a fourth amendment interest, notwithstanding Katz' lack of a property interest in the booth.[30]

The privacy expectation doctrine of *Katz* was extended to the standing area in *Mancusi v. DeForte*.[31] There, DeForte, a union official who shared an office with other employees, attempted to suppress papers seized during a search of the office.[32] The Court determined that DeForte's expectation of privacy was similar to that of the defendant in *Jones* and was therefore sufficient to accord him standing, despite the fact that he neither owned the seized papers nor had title to the searched premises.[33]

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[24] *Id.; see* text accompanying notes 25 and 26 *infra*. *Jones* was followed by the Mississippi Supreme Court in Canning v. State, 226 So. 2d 747, 751-52 (Miss. 1969).

[25] 390 U.S. 377 (1968).

[26] *Id.* at 394; *see* text accompanying note 128 *infra*.

[27] *But see* notes 128 through 141 and accompanying text *infra* (discussing the potential use of suppression hearing testimony for purposes of impeachment).

[28] 389 U.S. 347 (1967).

[29] *Id.* at 348-49.

[30] *Id.* at 350-53.

[31] 392 U.S. 364 (1968).

[32] *Id.* at 365.

[33] *Id.* at 367-70. Justice Black, dissenting, contended that the logical extension of the Court's holding would do away with standing entirely. *Id.* at 376.

The 1969 decision in *Alderman v. United States*[34] constituted the Supreme Court's most extensive pre-*Rakas* discussion of the general standing requirement for the exclusionary rule and dealt in particular with the question of third party standing. *Alderman* involved the admissibility against one defendant of evidence obtained from an illegal wiretap of another defendant's conversation. The Court, in rejecting vicarious standing for co-defendants or co-conspirators, determined that only a victim of the search has standing and only one whose privacy has been invaded can properly call himself a "victim" of the search.[35] Employing a balancing test, the Court concluded that the public interest in a criminal prosecution based on all the relevant evidence outweighed any additional benefit which might result from the extension of the exclusionary rule to those unable to show a violation of personal privacy.[36] In reaching its decision, the Court made it clear that the fourth amendment does not require the adoption of all procedures which would deter illegal searches, but rather the deterrent value of the exclusionary rule must be measured against the practical considerations involved in excluding relevant evidence from criminal trials.[37]

II. *Rakas* AND THE LEGITIMATE EXPECTATION OF PRIVACY REQUIREMENT

A. *The* Rakas *Holding*

The decision in *Rakas v. Illinois*[38] reflected the Court's dissatisfaction with both the theoretical foundation and practical implications of the existing law of standing. In this case, police stopped a car in which the defendants were passengers, suspecting that the car might have been used in a recent robbery. The police searched the interior of the car and found a sawed-off rifle under the front passenger seat and a box of rifle shells in the locked glove compartment.[39] Neither of the defendants claimed ownership of either the automobile, the rifle, or the shells.[40] In affirming the lower court decision that the defendants lack-

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[34] 394 U.S. 165 (1969). For a discussion of the electronic surveillance questions presented in *Alderman*, see notes 118 through 125 and accompanying text *infra*.

[35] 394 U.S. at 174.

[36] *Id.* at 174-75.

[37] *Id.* The Court, in Rakas v. Illinois, 439 U.S. 128 (1978), stated that *Alderman* clearly rejected third party standing as a constitutional requirement for all fourth amendment cases. 439 U.S. at 138 n.6.

[38] 439 U.S. 128 (1978).

[39] *Id.* at 130.

[40] *Id.* at 130 & n.1.

ed standing to object to the search and seizure, the Supreme Court engaged in an extensive discussion of the parties properly entitled to invoke the exclusionary rule.

The Court first rejected the target theory, urged by the defendants, by employing the balancing approach outlined in *Alderman* and by identifying the administrative impracticability of such a rule.[41] The Court denied that the phrase "one against whom the search was directed" contained in the *Jones* definition of "person aggrieved"[42] was a tacit endorsement of the target theory.[43] Secondly, the *Rakas* majority determined that the concept of standing served no useful purpose in the fourth amendment context in that standing was "invariably intertwined" with substantive fourth amendment law and a determination of rights under the fourth amendment obviated the necessity of resort to standing concepts.[44] The Court thus made the relevant inquiry whether the fourth amendment rights of a criminal defendant were violated by a search and seizure.[45] Relying on *Katz*, the Court stated that since the fourth amendment protects areas or items in which individuals have established a reasonable expectation of privacy, the question then becomes whether the defendants have such an interest in the area searched.[46] While admitting that this new approach in no way simplified the disposition of fourth amendment cases,[47] the majority found the "sounder logical footing" which the new analysis provided to be a sufficiently compelling reason for the change.[48]

Finally, the majority found the "legitimately on [the] premises" test set forth in *Jones* to be too broad a standard by which to measure the ability to assert fourth amendment rights.[49] *Jones* was reduced to the proposition that one may have an interest in a place other than his home sufficient to protect him from unreasonable governmental intrusion into that place.[50] Thus, one's legal right to be present at a certain

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[41] *Id.* at 132-38; *see* notes 10 through 13 and accompanying text *supra.*

[42] *See* note 4 *supra.*

[43] 439 U.S. at 134-35.

[44] *Id.* at 138-40; *see* note 5 *supra.*

[45] 439 U.S. at 140.

[46] *Id.* at 143-44.

[47] *Id.* at 140.

[48] *Id.*

[49] *Id.* at 142. The Court noted that the lower courts had applied this language from *Jones* literally, resulting in some decisions contrary to the spirit of *Jones. Id.* at 142 n.10; *see, e.g.,* Garza-Fuentes v. United States, 400 F.2d 219, 221 (5th Cir. 1968) (drug dealers making purchase in room rented by federal agents held to have standing), *cert. denied,* 394 U.S. 963 (1969).

[50] *Id.* at 142-43. In United States v. Hunt, 505 F.2d 932, 938 (5th Cir. 1974), *cert.*

location becomes merely one of the factors to be considered in determining whether the person had a legitimate expectation of privacy in the premises searched.[51]

Concluding its discussion of standing principles in general, the Court turned to the facts in the instant case. Of prime importance was the fact that neither defendant claimed a property or possessory interest in the automobile or the items seized.[52] The fact that both defendants were legitimately on the premises at the time of the search was held not to be determinative.[53] The Court concluded that neither defendant enjoyed a legitimate expectation of privacy in the searched car, and, thus, neither party had the interest necessary to contest the legality of the search and seizure.[54]

The four dissenters in *Rakas*, while agreeing with the majority's rejection of the target theory,[55] objected strongly to the majority's repudiation of the "legitimately on the premises" test of *Jones*.[56] The dissenters claimed that the holding effectively substituted an uncertain and hard-to-apply standard in place of a relatively easily-applied rule.[57] Additionally, the dissent claimed that the practical result of the majority's decision was the elevation of property-based considerations to the forefront once again, despite claims to the contrary.[58] Finally, the dissenters stressed the decision's impact in undercutting the deterrent value of the exclusionary rule by virtually inviting policemen to violate the rights of a group, knowing that probably few in the group can establish the requisite privacy interest.[59]

B. Further Limitation of the Standing Doctrine: Salvucci *and* Rawlings

The Supreme Court continued its erosion of the class of persons

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denied, 421 U.S. 975 (1975), the Fifth Circuit described *Jones* in language almost identical to that used by the *Rakas* majority.

[51] 439 U.S. at 148. Justice White, dissenting in *Rakas*, contended that by rejecting the legitimately on the premises test in favor of the legitimate expectation of privacy standard, the court was rejecting a "bright line" rule in favor of one which was much more difficult to apply and would result in considerable confusion among law enforcement personnel. *Id.* at 168.

[52] 439 U.S. at 130.

[53] *Id.* at 148; *see* text accompanying note 51 *supra*.

[54] 439 U.S. at 148-50.

[55] *Id.* at 156 n.1 (White, J., dissenting).

[56] *Id.* at 158 (White, J., dissenting).

[57] *Id.* at 168 (White, J., dissenting); *see* note 51 *supra*.

[58] *Id.* at 156-57 (White, J., dissenting); *see* note 104 *infra*.

[59] *Id.* at 168-69 (White, J., dissenting).

entitled to assert the exclusionary rule in two 1980 decisions, *United States v. Salvucci*[60] and *Rawlings v. Kentucky*.[61] In *Salvucci*, the defendants, charged with unlawful possession of stolen mail, relied on *Jones* in claiming that they were entitled to "automatic standing." The Supreme Court determined, however, that the two factors supporting the rule in *Jones* were no longer viable. The Court first found that the risk that the defendant might be compelled to admit possession at the suppression hearing, and thereby incriminate himself, was eliminated by the ruling in *Simmons* that suppression hearing testimony was inadmissible at trial.[62] The Court then addressed the second prong of *Jones*, the "vice of prosecutorial self-contradiction," whereby the Government would contend that the defendant possessed the seized goods for purposes of criminal liability while simultaneously denying that he had possession for the purposes of claiming the protection of the fourth amendment.[63] The Court noted that, after *Rakas*, the question was not merely whether the defendant had a possessory interest in the items seized but also whether he had an expectation of privacy in the area searched that had been violated.[64] Since the Government could now consistently argue that a defendant lacked possession sufficient to confer standing yet had possession sufficient to be convicted, the Court ruled that this assumption underlying the automatic standing rule must also be discarded.[65] Accordingly, the Court overruled the automatic standing doctrine.[66] The Court dismissed a final argument that the *Jones* rule maximized deterrence of illegal police conduct and thus should be retained by employing the balancing approach to the use of the exclusionary rule as set forth in *Alderman*.[67]

In *Rawlings*, the Court made a direct application of the *Salvucci* reasoning that possession of seized goods and a legitimate expectation of privacy in the area searched do not necessarily correspond. The defendant in *Rawlings* was charged with possession of drugs that had been discovered in the purse of an acquaintance.[68] The Court deter-

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[60] 448 U.S. 83 (1980).

[61] 448 U.S. 98 (1980).

[62] 448 U.S. at 89-90; *see* text accompanying notes 26 and 27 *supra*.

[63] *See* Jones v. United States, 362 U.S. 257, 263-64 (1960) ("prosecution . . . subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation").

[64] 448 U.S. at 91.

[65] *Id.* at 90-91; *see* text accompanying note 70 *infra*.

[66] 448 U.S. at 85, 95.

[67] *Id.* at 94.

[68] Rawlings was a visitor to a house belonging to a third party. The police arrived with a warrant to arrest the owner of the house on drug charges. While inside the house,

mined that the defendant had no legitimate expectation that the third party's purse would remain free from governmental intrusion and thus failed to show a personal privacy interest that had been invaded.[69] The Court so held despite the fact that the defendant owned the drugs. Ownership of property will thus not necessarily confer the right to challenge the search and seizure, but rather serves merely as a factor to be considered in determining a party's expectation of privacy in the relevant area.[70]

C. *The Legitimate Expectation of Privacy Standard*

Proprietary and possessory interests in property searched or goods seized have traditionally determined one's ability to invoke the protection of the fourth amendment to contest illegal government action.[71] However, in *Katz v. United States,* the Supreme Court determined that the amendment "protects people, not places,"[72] and the Court therefore developed the reasonable expectation of privacy doctrine to determine when an invasion of a fourth amendment interest occurs.[73] The Court's decision in *Katz* to eschew reliance on property concepts was generally well received by commentators, many of whom saw the decision as a broadening of fourth amendment protections.[74] In sharp

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the police conducted a search of Rawlings and of several other visitors, including Cox, an acquaintance of Rawlings. In Cox's handbag they found a large quantity of LSD and other drugs, ownership of which was immediately claimed by Rawlings. Rawlings v. Kentucky, 448 U.S. at 100-01.

[69] *Id.* at 104-05. The Court noted that Rawlings had known Cox only a few days, had put the drugs in her purse only a few minutes before the police arrived, and did not have prior access to her purse. *Id.* at 105; *see* note 98 *infra.*

[70] 448 U.S. at 105.

[71] Brown v. United States, 411 U.S. 223, 229 (1973); Jones v. United States, 362 U.S. 257, 263 (1960).

[72] Katz v. United States, 389 U.S. at 351.

[73] *Id.* at 351-52. The term "reasonable expectation of privacy" is not found in the majority opinion in *Katz,* but rather comes from Justice Harlan's concurring opinion, which has been accorded great weight. *See, e.g.,* Smith v. Maryland, 442 U.S. 736, 740 (1979) (applying Harlan's formulation). Harlan's frequently-quoted interpretation of the privacy requirement is as follows: "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361 (Harlan, J., concurring).

[74] *See, e.g.,* Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 385 (1974) (privacy analysis enlarges traditional boundaries of fourth amendment protection); Note, *The Reasonable Expectation of Privacy—Katz v. U.S., A Postscriptum,* 9 IND. L. REV. 468, 473-74 (1976) (*Katz* adds new dimension to fourth amendment protection to compensate for technological advances); Note, *From Private Places to Per-*

contrast to these expectations, the Court's recent standing decisions use the expectation of privacy concept to narrow the class of defendants protected by the fourth amendment.[75] This result is largely due to the fact that the Court has employed the property concepts supposedly rejected in *Katz* to limit the application of the privacy test itself. *Rakas* and *Rawlings* both emphasized the lack of the defendants' proprietary and possessory interests in the area searched to support the conclusion that these defendants had no legitimate expectation of privacy that was invaded by the search.[76] This fact, coupled with the failure of the Court to detail adequately which non-possessory factors the defendants in each case lacked so as to establish a legitimate expectation of privacy in the area searched, lends credence to the charge of the *Rakas* dissenters that the Court has returned to a property-based view of the fourth amendment.[77]

Of particular importance in evaluating the privacy approach to standing is the determination in *Rawlings* and *Salvucci* that the defendant must have a legitimate expectation of privacy in the *area searched,* as distinguished from the item seized.[78] Prior to these cases it seemed clear that an interest in either the place searched or the property seized was sufficient to contest an unreasonable search and seizure.[79] Justice Rehnquist, writing for the majority in both cases, relied on *Rakas* in asserting that ownership of a seized item does not necessarily entitle one to contest the search and seizure.[80] Yet *Rakas*

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sonal Privacy: A Post-Katz Study of Fourth Amendment Protection, 43 N.Y.U.L. REV. 968, 977 (1968) (*Katz* expands number of litigants entitled to standing).

[75] The Court's restrictive interpretation of *Katz* actually began before the decision in *Rakas. See* Note, *A Reconsideration of the Katz Expectation of Privacy Test,* 76 MICH. L. REV. 154, 154 & n.5 (1977) (reevaluating *Katz* in light of later cases).

[76] *See* Rawlings v. Kentucky, 448 U.S. at 105 (bailment relationship confers insufficient right to exclude others from relevant area); Rakas v. Illinois, 439 U.S. at 148 (citing defendants' failure to assert a property or possessory interest in the searched automobile). The *Salvucci* Court did not analyze the expectation of privacy requirement in light of the respondents' reliance on automatic standing. 448 U.S. at 95.

[77] *See* Rakas v. Illinois, 439 U.S. at 156-57 (White, J., dissenting) (majority tying application of exclusionary rule to property law concepts).

[78] *See* Rawlings v. Kentucky, 448 U.S. at 105 (ownership of seized property is insufficient to confer standing); United States v. Salvucci, 448 U.S. at 91-93 (same).

[79] *See* Simmons v. United States, 390 U.S. 377, 389-90 (1968) (either interest has traditionally been sufficient to accord standing); Jones v. United States, 362 U.S. 257, 261, 264 (1960) ("The possession [of narcotics] on the basis of which petitioner is to be and was convicted suffices to give him standing under any fair and rational conception of the requirements of Rule 41(e)"). *Rakas* did little to dispel this idea. *See* note 81 *infra.*

[80] *See* Rawlings v. Kentucky, 448 U.S. at 105; United States v. Salvucci, 448 U.S. at 91-93. The *Salvucci* Court held that ownership of seized property was a factor to be

contains express language which tends to show that this reliance was misplaced.[81] Furthermore, as Justice Marshall's dissent in *Rawlings* pointed out, *Rakas* merely decided the question of whether the defendants had a right to fourth amendment protection based solely on the fact that they were legitimately on the premises. Since the defendants asserted no ownership or possessory interest in the premises searched or property seized,[82] the issue of property-based standing was not even before the *Rakas* Court. The problems with discounting one's ownership of a seized item are several. First, such an approach tends to overlook the fourth amendment's guarantee that people will be secure in their "papers" and "effects" as well as in their "houses."[83] Second, the almost exclusive emphasis on the privacy expectation in the area

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considered in determining one's right to object. *Id.* at 91. However, the decisions in both *Salvucci* and *Rawlings* indicate the minimal impact which a property interest in such an item has on the Court's privacy analysis.

A footnote to the *Salvucci* decision stated that legal possession of a seized good may sometimes be sufficient to entitle a party to seek the return of the item if the seizure, as opposed to the search, was illegal. 448 U.S. at 91 n.6. Such a possessory interest in the item seized would therefore give a defendant who is unable to establish a privacy expectation in the area searched standing to contest the legality of only the seizure, not the search preceding it. This standing would be limited to narrow grounds, for example, that the goods were not contraband, the product of criminal activity, or evidence of a crime. *See* United States v. Lisk, 522 F.2d 228, 230-31 (7th Cir. 1975) (listing grounds), *cert. denied*, 423 U.S. 1078 (1976). Justice Marshall, in a vigorous dissent in *Rawlings*, urged that the illegal seizure of items owned by an individual gives one the right to challenge not only the seizure, but also the search which preceded it. 448 U.S. at 117-18; *see* United States v. Jeffers, 342 U.S. 48, 52 (1951) ("The search and seizure are . . . incapable of being untied"). However, as the *Lisk* court intimated, it seems likely that no legitimate expectation of privacy will be found when a party relies solely on the ownership of contraband or property used in an illegal activity. W. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 2.03(b)(1) (2d ed. 1980). *Compare* United States v. Archibold-Newball, 554 F.2d 665, 678 (5th Cir.) (mere fact of proprietary interests in drugs is insufficient to infer violation of privacy interest upon their seizure), *cert. denied*, 434 U.S. 1000 (1977) *with* United States v. Banks, 465 F.2d 1235, 1241 (5th Cir. 1972) (owner of printing press used to produce counterfeit money and seized in co-defendant's residence has standing to contest the search leading to the seizure).

[81] In discussing why the "legitimately on the premises" standard should no longer apply to grant standing to visitors in a home, the *Rakas* Court stated: "This is not to say that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search." 439 U.S. at 142 n.11. The Court later stated: "Judged by the foregoing analysis, petitioners' claims must fail. They asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized." *Id.* at 148. The obvious implication of such language is that ownership of seized property would be sufficient to entitle one to object.

[82] *Id.* at 129, 148.

[83] U.S. CONST. amend. IV.

searched ignores the admonition in *Katz* that the protections of the fourth amendment "go further, and often have nothing to do with privacy at all."[84] The *Katz* privacy expectation doctrine is thus best viewed as one which supplements, but not totally replaces, the traditional protections provided by the fourth amendment.[85] Finally, disregarding one's interest in a seized item precludes a defendant whose property is not under his immediate control from contesting the search and seizure of the property, no matter how reprehensible the action was that resulted in the seizure. This approach thus undercuts the deterrent function of the fourth amendment by removing any restraining influence on policemen who seize a defendant's property when it is either not on his person or otherwise outside of an area[86] in which he has an expectation of privacy.[87] A return to a more balanced analysis which

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[84] Katz v. United States, 389 U.S. at 350. In addition, the *Salvucci-Rawlings* privacy test directly conflicts with the finding in *Katz* that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of a Fourth Amendment protection . . . [b]ut what he seeks to preserve as private, *even in an area accessible to the public,* may be constitutionally protected." *Id.* at 351-52 (emphasis added). If, as was recently stated, *Katz* is the "lodestar" which determines when an unreasonable search has taken place, Smith v. Maryland, 442 U.S. 736, 739 (1979), the present Court may be slightly off course.

[85] *See* Rawlings v. Kentucky, 448 U.S. at 118-19 (Marshall, J., dissenting) (*Katz* not intended to be an exclusive statement of interests protected under the fourth amendment); note 74 and accompanying text *supra.*

[86] The Court has not been completely clear in delineating exactly in what area the defendant must have a privacy interest to achieve an expectation of privacy in the "area searched." The *Salvucci* Court remanded the case to allow the defendants the opportunity to establish a privacy expectation "in the area of Zackular's [defendant's] mother's home where the goods were seized." 448 U.S. at 95. Likewise, Justice Marshall, dissenting in *Rawlings,* inferred that by "area searched" the majority meant the "premises" on which the search took place. 448 U.S. at 118. However, the *Rawlings* majority considered only the privacy expectations of the defendant in the *purse* in which the drugs were found, without referring to the house. *Id.* at 103-06. Further, the *Rakas* Court spoke of the defendants' failure to establish a legitimate expectation of privacy in specific areas within the searched car, 439 U.S. at 148-49, while also referring to the interest the defendant in *Jones v. United States* had in the entire apartment in which he was staying. *Id.* at 140-42. Thus, it seems that while the "area searched" may include the entire premises, it may also be limited to the immediate area from which the seized property was confiscated.

[87] The words of Justice White, dissenting in *Rakas,* are especially appropriate here. In arguing that the majority's decision greatly increased the possibility of bad-faith violations of the fourth amendment, Justice White commented:

> Of course, most police officers will decline the court's invitation and will continue to do their jobs as best they can in accord with the Fourth Amendment. But the very purpose of the Bill of Rights was to answer the justified fear that governmental agents cannot be left totally to their own devices, and

would equate a litigant's privacy expectation in property seized with that of the area searched would seem to be the path most consistent with the spirit of the fourth amendment.[88]

One of the problems with the recent standing decisions is the Court's failure to spell out the factor or factors that would have established that the defendants had a legitimate expectation of privacy in the areas searched. While stating that property law concepts no longer control,[89] the Court has proceeded to deny privacy interests to defendants largely on the basis of their failure to show a proprietary or possessory interest in the relevant area.[90] Lower courts are thus left with an uncertain guide in applying the Court's privacy standard.

The *Rakas* majority concentrated most of its analysis of the privacy standard in a footnote in which it stressed the importance of property rights:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.[91]

> the Bill of Rights is enforceable in the courts because human experience teaches that not all such officials will otherwise adhere to the stated precepts. Some policemen simply do act in bad faith, even if for understandable ends, and some deterrent is needed. In the rush to limit the applicability of the exclusionary rule somewhere, anywhere, the court ignores precedent, logic, and common sense to exclude the rule's operation from situations in which, paradoxically, it is justified and needed.

439 U.S. at 169.

[88] At least two commentators have proposed factors which the Court should consider in addition to the interest in the area searched when evaluating a privacy expectation claim. *See* Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 52-64 (1974) (proposing three different privacy interests: the privacy of place, the privacy of presence, and the privacy of possession); 55 TUL. L. REV. 250, 265 (1980) (urging consideration of privacy interests in both the area searched and property seized as well as the circumstances by which the seized property was located in the searched area). *See also* 58 NEB. L. REV. 1123, 1136-37 (1979) (applying the Weinreb analysis to the facts of *Rakas*).

[89] Rawlings v. Kentucky, 448 U.S. at 105; Rakas v. Illinois, 439 U.S. at 143, 149 n.17.

[90] *See* note 76 and accompanying text *supra*.

[91] 439 U.S. at 143 n.12. The Court also noted that one's legitimate presence on the premises searched, while no longer a controlling consideration, was still not "irrelevant" to one's expectation of privacy. *Id.* at 148.

The Court's reliance upon an individual's power to exclude others from the premises searched as an indication of a protectible fourth amendment interest reflects the influence of earlier decisions in which this power was deemed determinative.[92] This influence can also be seen in *Rawlings*, in which the Court emphasized the defendant's inability to exclude others from the purse in which he had placed drugs as proof of the unreasonableness of his privacy expectation.[93]

In light of the *Rakas* majority's failure to clearly delineate the factors to be considered in evaluating an individual's privacy expectation claim, Justice Powell, in a concurring opinion, attempted to set forth four such considerations. First, a court should examine whether the person seeking to invoke the protection of the fourth amendment took normal precautions to maintain his privacy.[94] A second factor to be considered is the manner in which a defendant has used the premises searched.[95] Third, the history of the fourth amendment should be considered to determine whether the governmental intrusion would have been objectionable to the framers of the Constitution.[96] Justice Powell's final indicator of a legitimate expectation of privacy is the extent to which an individual can show property rights which were invaded by the search and seizure.[97] In the absence of a clear-cut exposition of the

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[92] *See* Katz v. United States, 389 U.S. at 352 (individual who occupied phone booth and shut door to exclude others entitled to fourth amendment protection); Jones v. United States, 362 U.S. 257 (1960), *construed in* Rakas v. Illinois, 439 U.S. at 149 (emphasizing fact that Jones could exclude all others except friend from the friend's apartment).

[93] *See* 448 U.S. at 105. *But cf.* W. LAFAVE, SEARCH AND SEIZURE § 11.3, at 112-13 (Supp. 1981) (criticizing the inability to exclude reasoning of *Rawlings* as erroneous and inconsistent with prior standing decisions).

[94] 439 U.S. at 152-53. *See* United States v. Andrews, 618 F.2d 646, 651-52 (10th Cir.) (no expectation of privacy in package containing drugs sent by air cargo wrapped only in brown paper), *cert. denied*, 449 U.S. 824 (1980).

[95] 439 U.S. at 153. Justice Powell cited *Jones v. United States* as an example of a case in which a defendant had obtained a privacy interest in an area he did not own by virtue of his use of the premises. *Id.*

[96] *Id.* (citing United States v. Chadwick, 433 U.S. 1, 7-9 (1977)). It has been suggested that this final category may serve as a "catch-all" for the privacy interests that are not easily placed into one of the other factors outlined. Comment, *Rakas v. Illinois: The End of Fourth Amendment Standing But Not of Fourth Amendment Confusion*, 46 BROOKLYN L. REV. 123, 141 n.100 (1979).

[97] 439 U.S. at 153; *see* notes 90 through 93 and accompanying text *supra*.

It should be noted that the factors outlined by Justice Powell are merely guides to be used in determining the larger question of whether a defendant possesses an actual expectation of privacy that society considers reasonable. *See* note 73 *supra*. It is clear that the passage of federal and state legislation granting privacy protection to individuals in certain situations would, by itself, create actual privacy expectations that must

relevant factors by a majority of the Court,[98] lower courts have been forced to apply the factors outlined by Justice Powell.[99] Additional gui-

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then be considered to be reasonable. Additionally, state courts could interpret their own constitutions so as to provide their citizens greater expectation of freedom from invasions of privacy than accorded under the United States Constitution, *see* note 9 *supra*, thereby mitigating the effect of the Supreme Court's restrictive interpretation of fourth amendment protections. For example, in United States v. Miller, 425 U.S. 435 (1976), the Supreme Court held that a bank customer lacked the requisite fourth amendment interest to challenge subpoenas to the bank for records of his transactions. Since *Miller*, three state legislatures have enacted statutes granting bank depositors an actual expectation that their bank records will not be inspected by government officials without notice and an opportunity to contest the inspection. Additionally, courts in at least two states have rejected the *Miller* rationale and determined, in effect, that their state constitutions grant depositers a reasonable expectation of privacy in their bank records. Depositers in such states could then legitimately argue, despite *Miller*, that *Katz* had been satisfied. For a comprehensive discussion of the *Miller* decision and the implications of later state legislative or judicial determinations, see Note, *Reasonable Expectations of Privacy in Bank Records: A Reappraisal of United States v. Miller and Bank Depositor Privacy Rights*, 72 J. CRIM. L. & CRIMINOLOGY 243, 270-91 (1981).

[98] In *Rawlings v. Kentucky*, the majority determined that the defendant, who had given illegal drugs to his companion, Cox, lacked a legitimate expectation of privacy in Cox's purse, where the drugs were found. The Court relied on the following factors in reaching this conclusion: (1) Rawlings had known Cox only a few days, (2) he had not previously sought or received access to her purse, (3) he had no right to exclude others from Cox's purse, (4) another companion had rummaged through her purse earlier that morning, (5) the transaction was too "precipitous" to support a finding that Rawlings took precautions to maintain his privacy, and (6) Rawlings admitted that "he had no subjective expectation that Cox's purse would remain free from governmental intrusion." 448 U.S. at 104-05. It is unclear to what extent these factors will control the determination of privacy expectations in future cases. Professor Wayne R. LaFave has severely criticized the Court's reliance on the *Rawlings* factors. *See* W. LAFAVE, *supra* note 93, at 111-15.

[99] *See* United States v. Foskey, 636 F.2d 517, 520-21 (D.C. Cir. 1980) (no expectation of privacy in bag under gas tank flap); United States v. Arboleda, 633 F.2d 985, 991 (2d Cir. 1980) (no privacy interest in ledge outside apartment window), *cert. denied*, 450 U.S. 917 (1981); United States v. Smith, 621 F.2d 483, 487 (2d Cir. 1980) (listing factors and finding no legitimate expectation of privacy).

Cases which have discussed the legitimate expectation of privacy requirement since *Rakas* include: Walter v. United States, 447 U.S. 649, 658-59 (1980) (legitimate expectation of privacy not lost by consignee when third party opens package prior to receipt by consignee); United States v. Cortina, 630 F.2d 1207, 1215-16 (7th Cir. 1980) (legitimate expectation of privacy not required to be shown by defendants in order for court to invoke supervisory power to suppress evidence); United States v. Bailey, 628 F.2d 938, 942-43 (6th Cir. 1980) (electronic beeper surveillance may invade an individual's legitimate expectation of privacy); United States v. Agapito, 620 F.2d 324, 331, 334 (2d Cir.) (granting standing to occupant of motel room but noting lesser expectation of privacy in rented areas as contrasted with home), *cert. denied*, 449 U.S. 834 (1980); United States v. Vicknair, 610 F.2d 372, 379-81 (5th Cir.) (discussion of expectation of privacy require-

dance by the Court on the legitimate expectation of privacy standard is needed in future cases so that lower courts may determine exactly which non-possessory factors are important in determining one's privacy interest in an area.

D. Special Situations

1. Automobile Searches

The Court in *Rakas* declined to determine whether the showing necessary to establish a legitimate expectation of privacy when the area searched is an automobile is different from that required when the area searched is a dwelling.[100] However, the Court did note the distinction which traditionally has been drawn between the two areas[101] and this reference, coupled with the absence of any contrary language, clearly intimates that one must make a more substantial showing in order to attain a privacy interest in a car than in a dwelling.

Justice Powell, concurring in *Rakas*, answered the question the majority skirted by expressly finding that a lesser expectation of privacy existed in cars than in homes.[102] Justice White, dissenting, attacked this conclusion by stating that it was contrary to the everyday expectations of individuals[103] and would result in the abrogation of le-

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ment), *cert. denied*, 449 U.S. 823 (1980); American Motors Corp. v. FTC, 601 F.2d 1329, 1338 (6th Cir.) (parties who place documents in channels of commerce in the normal course of business do not ordinarily retain a legitimate expectation of privacy in them), *cert. denied*, 444 U.S. 941 (1979); United States v. Tolbert, 517 F. Supp. 1081, 1084-94 (E.D. Mich. 1981) (discussion of interaction between abandonment doctrine and expectation of privacy requirement).

[100] 439 U.S. at 148. The Court determined that petitioners' claim would have failed even if the search had been in a dwelling. *Id.*

[101] *Id.*; *see, e.g.*, United States v. Chadwick, 433 U.S. 1, 12-13 (1977) (automobile has a diminished expectation of privacy because it is not designed to hold personal effects and is subject to extensive governmental regulation); United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976) (one's expectation of privacy in a car is substantially different from traditional expectation of privacy in a home); Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion) (lesser expectation of privacy exists in a car because its function is transportation and it serves no residential or permanent storage function); Chambers v. Moroney, 399 U.S. 42, 48 (1970) (for purposes of the fourth amendment there is a constitutional difference between cars and houses); Carroll v. United States, 267 U.S. 132, 153-55 (1925) (inherent mobility of automobile permits lower standard of reasonableness for searching a vehicle than for other places).

[102] 439 U.S. at 153-55. Justice Powell noted: "There are sound reasons for this distinction: Automobiles operate on public streets; they are serviced in public places; they stop frequently; they are usually parked in public places; their interiors are highly visible; and they are subject to extensive regulation and inspection." *Id.* at 154 n.2.

[103] 439 U.S. at 167, 168 n.21.

gitimate privacy interests for all occupants of a car other than the owner.[104]

Rakas held that mere passengers[105] do not have a legitimate expectation of privacy in the glove compartment, the area under the car seat, or the trunk—in essence, in any part of the car.[106] Lower court decisions since *Rakas* have generally reflected the apparent requirement of a possessory interest in a car in order to contest a search of the vehicle.[107] Judging by the literal language of the fourth amendment, it

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[104] *Id.* at 168-69. Despite the fact that the *Rakas* majority at three different points denied that common-law property interests controlled their determination of fourth amendment rights, *id.* at 143 & n.12, 149 n.17, Justice White, in his dissent, stated that the majority view operated to protect property, not people, and would encourage an "open season" on automobiles by inducing law enforcement officials to illegally search vehicles in an effort to turn up incriminating evidence which the passengers would, in all likelihood, be unable to contest. *See* text accompanying note 59 *supra*.

The *Rakas* Court hinted that an owner of a vehicle who was present at the time of the search would likely have the requisite expectation of privacy in the vehicle to challenge the search. However, if the owner turns over control of the vehicle to another, he may relinquish his expectation of privacy in the vehicle, at least as to the passenger compartment or other areas within the bailee's immediate control. In United States v. Dall, 608 F.2d 910 (1st Cir. 1979), the court deemed the owner's absence from the vehicle so important as to deny his claim to a legitimate expectation of privacy in a locked compartment at the back of the truck, despite the fact that the bailee did not have the key to the locked compartment and despite the bailee's asserted lack of knowledge of the contents. *Id.* at 915. For a pre-*Rakas* look at the significance of the owner's absence from a searched vehicle on his expectation of privacy therein, see United States v. Holmes, 521 F.2d 859, 867 (5th Cir. 1975), *aff'd on rehearing*, 537 F.2d 227, 228 (5th Cir. 1976) (owner who was not present at time of search, but who had been present when electronic beeper was attached to vehicle, has standing); United States v. Nunn, 525 F.2d 958, 959 (5th Cir. 1976) (owner lacked reasonable expectation of privacy in truck on loan to friends); United States v. McConnell, 500 F.2d 347, 348 (5th Cir. 1974) (lessee of rental car lacked standing to contest search of vehicle which he had turned over to codefendant).

[105] 439 U.S. at 148-49. The Court noted that a "passenger qua passenger" would normally not have the requisite privacy interest. The Court then proceeded, however, to distinguish the petitioner's claim from that offered in Jones v. United States, 362 U.S. 257 (1960) and Katz v. United States, 389 U.S. 347 (1967), thereby implying that the grant of a possessory interest, including the right to exclude, to the passenger by the owner would be sufficient to confer a legitimate expectation of privacy to the passenger.

[106] 439 U.S. at 148-49. One commentator has noted, however, that passengers who can demonstrate use of a vehicle on a regular basis may well be able to establish a legitimate expectation of privacy in the place searched. Such a group might include the owner's family members, car pool members, or employees of the car owner. W. RINGEL, *supra* note 80, § 11.6 (2d ed. 1980).

[107] *See, e.g.*, United States v. Sanchez, 635 F.2d 47, 64 (2d Cir. 1980) (possession of car keys, absent showing of ownership or license from owner to possess the car, is insufficient to establish a legitimate expectation of privacy); United States v. Portillo, 633 F.2d

seems incongrous that automobile passengers should have to forfeit a large part of the amendment's protection simply because they fail to attain a formal property interest in the car.[108]

Although precluded from challenging the search of a vehicle in which they are riding, passengers may still contest the initial stop of the vehicle since such a stop involves a personal seizure of all the occupants. Thus, if the stop is found to be illegal, the evidence later gained will be tainted by the initial illegality, and will be inadmissible.[109] It should be noted, however, that the justification necessary for a stop is less than that needed for a search.[110]

2. Electronic Surveillance

In 1967, in *Katz v. United States*,[111] the Supreme Court determined that electronic eavesdropping, even absent a physical trespass onto an individual's premises,[112] constituted a search and seizure and

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1313, 1316-17 (9th Cir. 1980) (passenger who demonstrated neither a property nor a possessory interest in car lacked an expectation of privacy; driver who had possession of the car entrusted to him by owner attained the requisite privacy interest); United States v. Vasquez-Vasquez, 609 F.2d 234, 235 (5th Cir. 1980) (defendant is not "aggrieved" by the search of an automobile in which he had no proprietary or possessory interest); United States v. Burnett, 493 F. Supp. 948, 952 (N.D.N.Y. 1980) (lessee of van and individual who had lessee's written permission to possess the van had legitimate expectations of privacy therein); United States v. Lopez, 474 F. Supp. 943, 946-47 (C.D. Cal. 1979) (a non-owning driver who has permission to use the vehicle has the requisite possessory interest to challenge a search); United States v. Riviera, 465 F. Supp. 402, 411 (S.D.N.Y.) (passenger who fails to demonstrate proprietary interest in car or items seized lacks legitimate expectation of privacy), *aff'd mem. sub nom.*, United States v. Ramirez, 614 F.2d 1292 (2d Cir. 1979).

[108] Justice White, dissenting in *Rakas*, responded to the majority's holding by stating:

> If the owner of the car had not only invited petitioners to join her but had said to them, 'I give you a temporary possessory interest in my vehicle so that you will share the right to privacy that the Supreme Court says that I own,' then apparently the majority would reverse. But people seldom say such things, though they may mean their invitation to encompass them if only they had thought of the problem.

439 U.S. at 167.

Further, after noting that Katz v. United States, 389 U.S. 347 (1967), recognized an expectation of privacy for passengers in a taxicab, Justice White asked, "Why should Fourth Amendment rights be present when one pays a cabdriver for a ride but be absent when one is given a ride by a friend?" 439 U.S. at 167.

[109] 439 U.S. at 160 n.5 (White, J., dissenting).

[110] *Id.* (citing Terry v. Ohio, 392 U.S. 1 (1968)).

[111] 389 U.S. 347 (1967).

[112] The Court in *Katz* rejected the reasoning in Olmstead v. United States, 277 U.S.

was thus subject to the limitations of the fourth amendment.[113] Partly in response to *Katz,* Congress passed Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[114] which established a comprehensive scheme regulating wiretapping and other forms of electronic surveillance.[115] The ability to challenge violations of Title III was limited, as in a previous enactment,[116] to an "aggrieved person."[117] The following year, in *Alderman v. United States,*[118] the Supreme Court noted that this language was intended to be interpreted in accordance with existing rules of standing.[119] The Court then proceeded to designate, in language which deviated slightly from that in Title III,[120] the

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438 (1928), and Goldman v. United States, 316 U.S. 129 (1942), that the fourth amendment could be violated only when there was an actual physical intrusion onto a person's property. 389 U.S. at 352-53.

[113] 389 U.S. at 352-53.

[114] Title III is codified at 18 U.S.C. §§ 2510-2520 (1976).

[115] Although broadly written, Title III does not extend to devices such as an electronic beeper, which broadcasts a signal and is incapable of transmitting speech, or a pen register, which merely records the electronic impulses made when a telephone number is dialed. *See* J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE § 3.02(3)(b) (1977) (detailing activities which do not constitute interception under Title III).

[116] FED. R. CRIM. P. 41(e) provides that a "person aggrieved by an unlawful search and seizure" is entitled to move to suppress the evidence obtained therefrom. *See* note 4 *supra.*

[117] 18 U.S.C. § 2518(10)(a) (1976). The definition of "aggrieved person" is found in 18 U.S.C. § 2510(11) (1976) and includes "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

[118] 394 U.S. 165 (1969).

[119] *Id.* at 175 n.9. *But see* NATIONAL LAWYERS GUILD, RAISING AND LITIGATING ELECTRONIC SURVEILLANCE CLAIMS IN CRIMINAL CASES § 5.16(c) (1977) (despite legislative history, statute actually operates to contract standing to participants in the conversation monitored).

[120] The wording of 18 U.S.C. § 2510(11) (1976) differs from the *Alderman* formulation in two respects. First, the code definition contains no reference to ownership of the premises where the conversation took place as a basis for standing. Despite this fact, *Alderman's* inclusion of individuals who own the premises in question has been applied to cases arising under Title III. *See* J. CARR, *supra* note 115, § 6.02(1)(b) n.195 (1977) (citing cases). Secondly, the definition in *Alderman* fails to include the statutory grant of standing to persons "against whom the interception was directed." This language is based on wording found in Jones v. United States, 362 U.S. 257 (1960). *See* S. REP. No. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2179-80. This same language from *Jones* was later used by the petitioners in *Rakas* in an attempt to persuade the court to adopt a target theory of standing. *See* note 11 *supra.* However, the cases which have considered the significance of this language in Title III have determined that no one falls under the statutory definition of standing unless he also comes under the *Alderman* categories of party to the conversation or owner of the premises. Thus, the judicial definition has been found to be controlling. *See* United States v. Scasino, 513 F.2d 47, 50 (5th Cir. 1975) (statutory langauge reflects existing law

class of persons entitled to contest intercepted conversations. The majority in *Alderman* determined that any individual who was a party to an illegally seized conversation or who owned the premises where the unlawful interception took place was entitled to object to the illegal action.[121]

Alderman remains the landmark case in determining standing to contest evidence obtained through electronic surveillance. The grant of standing to persons whose conversations are unlawfully overheard follows directly from *Katz*[122] and thus easily can be justified under the reasoning adopted in *Rakas*. However, the automatic grant of standing to the owner of the premises,[123] without reference to whether he was present or participated in the conversations, seems to be an endorsement of the very type of property-based view of the fourth amendment the *Rakas* Court purported to abandon. In this instance, the question after *Rakas* is whether the owner of the premises who was implicated by the intercepted conversations had a legitimate expectation of privacy that, regardless of his presence or absence, conversations of third parties on his premises would remain private. The owner should usually be able to show the invasion of a legitimate expectation of privacy when he is present during the illegal surveillance. If he is absent, however, the present Court may well be persuaded to follow the reasoning of the dissenters in *Alderman*[124] and find that the privacy interest of

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of standing); United States v. Ahmad, 347 F. Supp. 912, 933 (M.D. Pa. 1972) (language in Title III is synonymous with *Alderman*), *aff'd in part, rev'd in part on other grounds sub nom.* United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973); J. CARR, *supra* note 115, § 6.02(1)(c) (legislative intent was not to expand standing beyond the judicial interpretation).

[121] 394 U.S. at 176. The *Alderman* opinion noted that states have the ability to expand standing under the exclusionary rule to allow individuals in addition to those protected by Title III to challenge illegal electronic surveillance. *Id.* at 175. However, only two states which have adopted Title III have seen fit to enlarge the class of individuals entitled to object beyond that provided for in Title III. *See* CONN. GEN. STAT. ANN. § 54-41(a)(10), -41(m) (West Supp. 1981) (includes any person named in the order authorizing the interception); MASS. GEN. LAWS ANN. ch. 272, § 99(B) (6) (West 1970) (same). *See generally* C. FISHMAN, WIRETAPPING AND EAVESDROPPING § 265 n.17 (1978) (discussing Connecticut and Massachusetts statutes).

[122] The Court in *Katz* determined that the placement without prior judicial approval of an electronic bug on the outside of a telephone booth occupied by defendant was an unlawful violation of defendant's right of privacy. 389 U.S. at 351-52.

[123] *See* text accompanying note 121 *supra*.

[124] Justices Harlan and Stewart, who dissented in part in *Alderman*, objected to protecting the owner of the invaded premises by allowing him to exclude third-party conversations intercepted on his premises. Justice Harlan stated, "The absent property owner does not have a property interest of any sort in a conversation in which he did not

an absent party cannot be violated by the fact that conversations of third parties were illegally obtained.[125]

III. The Road Ahead: Additional Standing Considerations

The law of standing represents a balance between two opposing objectives: deterrence of illegal police conduct and the societal interest in the introduction of all relevant evidence in a criminal prosecution. The exclusionary rule is the mechanism by which law enforcement officials are deterred from using improper methods to obtain evidence. The Supreme Court has indicated, however, on a number of occasions, its reluctance to exploit fully the deterrent capabilities of the rule, since to do so often inures to the benefit of the criminal and tends to inhibit the active pursuit of those engaged in illegal activities.[126] It is apparent, then, that the Court has decided to use the procedural context of standing as a means of restricting the application of a substantive rule which has fallen into disfavor. It is submitted that, instead of adopting such an approach, the Court should address directly the continued validity and efficacy of the exclusionary rule itself rather than distorting other doctrines to effect the desired change in judicial policy.[127]

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participate." 394 U.S. at 190 (Harlan, J., dissenting).

[125] By way of analogy, some courts have determined that a car owner who is not present at the time of an illegal search lacks standing to challenge the search, despite his property interest in the car. For a discussion of this point, see note 104 *supra*.

[126] *See* text accompanying note 37 *supra*.

[127] The exclusionary rule has been the subject of a great deal of spirited debate, both by courts and legal commentators, for a number of years. Several members of the United States Supreme Court have indicated their dissatisfaction with the rule. *See* California v. Minjares, 443 U.S. 916, 916-28 (1979) (Rehnquist, J., dissenting from denial of stay) (urging abolition of exclusionary rule and listing civil action as viable alternative); Stone v. Powell, 428 U.S. 465, 537-38 (1975) (White, J., dissenting) (calling for substantial limitation on the scope of the rule); Coolidge v. New Hampshire, 403 U.S. 443, 510 (1971) (Black, J., concurring and dissenting, joined by Blackmun, J.) ("the Fourth Amendment supports no exclusionary rule"); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 415, 422-27 (1971) (Burger, C.J., dissenting) (calling for replacement of the rule with a statutory remedy for recovery of damages). *See generally* W. LaFave, *supra* note 93, § 1.2 (evaluating the alternatives presented by members of the Court). The concept of a "good faith" exception to the rule has been urged as a means of modifying the rule's broad scope, yet retaining its deterrent capabilities. *See* United States v. Williams, 622 F.2d 830, 840-46 (5th Cir. 1980) (en banc) (unconstitutionally seized evidence is admissible at trial provided the officer who seized the evidence acted pursuant to a reasonable good faith belief that his actions were lawful), *cert. denied*, 449 U.S. 1127 (1981); Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. Crim. L. & Criminology 635, 644-57 (1978) (analyzing good faith

A. The Impeachment Issue

A primary question remaining after the recent pronouncements on fourth amendment standing is whether testimony given by a defendant at a suppression hearing is admissible at trial to impeach the credibility of the defendant. In *Simmons v. United States,* the Supreme Court ruled that when a defendant testifies in support of a motion to suppress, "his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection."[128] The Court did not determine the more limited question of whether such testimony would be admissible for the purpose of impeachment.[129] Lan-

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exception); Wright, *Must the Criminal Go Free if the Constable Blunders?,* 50 TEX. L. REV. 736, 745 (1972) (proposing good faith exception). For a discussion of the continued effectiveness of the exclusionary rule and suggestions for meaningful alternatives, see S. SCHLESINGER, EXCLUSIONARY INJUSTICE 71-85 (1977) (urging adoption of independent review board and civil action for damages to replace rule); Dellinger, *Of Rights and Remedies: The Constitution as a Sword,* 85 HARV. L. REV. 1532, 1552-64 (1972) (considering feasibility of action for damages as replacement for rule); Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives,* 1975 WASH. U.L.Q. 621, 686-721 (1975) (analyzing alternatives and urging retention of the rule); Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665, 718, 755-57 (1970) (empirical study concluding that the rule has no deterrent effect and proposing the adoption of a tort remedy to replace the rule).

As a point of reference, the Comptroller General of the United States determined, in a report issued in 1979, that the exclusionary rule does not have a statistically large effect on federal prosecutions. This finding resulted from a study by the General Accounting Office of 2,804 defendants charged in 38 United States Attorneys' offices during 1978. Only 11% of the defendants in the study filed a motion to suppress on fourth amendment grounds and a high percentage of these motions were denied, leaving only 1.3% of the 2,804 cases in which evidence was excluded by a motion to suppress. The study concluded that the granting of a fourth amendment motion did appear to reduce the likelihood of the defendant being convicted. However, the rule was found to have little direct impact on the case-screening process, as the U.S. Attorneys indicated that search and seizure problems were the primary reason for deciding not to prosecute in only 0.4% of the total declined cases. GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS 6-14 (1979) (Report of the Comptroller General).

[128] 390 U.S. at 394.

[129] The March, 1969 and March, 1971 drafts of the Federal Rules of Evidence contained the following sentence at the end of rule 104(d) with reference to a criminal defendant: "Testimony given by him at a hearing in which he is asserting any constitutional rights, or any right to have evidence suppressed or excluded, is not admissible against him as substantive evidence but may be used for impeachment if clearly contradictory of testimony given by him at the trial." This language was omitted from the final version.

In the absence of any such language in the rule as adopted, the Advisory Committee's Note to rule 104(d) simply states: "The rule does not address itself to questions of

guage in *Brown v. United States*,[130] decided five years after *Simmons*, implied that only direct use of the suppression hearing testimony in the prosecution's case-in-chief was prohibited.[131] Several courts which have considered the question have held that such testimony is admissible in evidence for impeachment purposes.[132] Justice Marshall, dissenting in *Salvucci*, contended that the majority opinion hinted that use for impeachment purposes was permissible.[133]

A decision by the Court allowing the use of suppression hearing testimony in such a manner would have the admirable quality of discouraging perjurious statements by defendants at trial and would be consistent with the Court's decisions allowing impeachment in purely fifth amendment contexts.[134] Additionally, it is clear that use of sup-

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the subsequent use of testimony given by an accused at a hearing on a preliminary matter." Rule 104(d) in its present form thus leaves open the question of use of a transcript of pretrial testimony at the trial itself.

The elimination of the language at the end of rule 104(d) apparently resulted from a reluctance to adopt an evidentiary rule in an area involving constitutional rights that was still being shaped by case law. 1 WEINSTEIN'S EVIDENCE ¶ 104 [10] (1979). Additionally, the deletion served to preclude potential Senate opposition to the absolute prohibition on the use of earlier testimony as substantive evidence at trial. *Id.*; P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 9-10 (1973). Accordingly, the removal of the language should probably not be viewed as a rejection of the ability of the prosecution to use suppression hearing testimony to impeach the defendant's testimony at trial.

[130] 411 U.S. 223 (1973).

[131] The Court stated that suppression hearing testimony "is not *directly* admissible" against a defendant at trial. *Id.* at 228 (emphasis supplied).

[132] Cases which have allowed suppression hearing testimony to be used for impeachment include: Woody v. United States, 379 F.2d 130, 131-32 (D.C. Cir.), *cert. denied*, 389 U.S. 961 (1967); People v. Douglas, 66 Cal. App. 3d 998, 136 Cal. Rptr. 358, 363 (1977); People v. Sturgis, 58 Ill. 2d 211, 317 N.E.2d 545, 548 (1974); Gray v. State, 43 Md. App. 238, 403 A.2d 853, 858 (1979). The opinion in *Woody*, decided one year before *Simmons*, was written by Judge Warren Burger of the Court of Appeals for the District of Columbia Circuit.

[133] 448 U.S. at 96-97.

[134] In Walder v. United States, 347 U.S. 62, 65 (1954), the Supreme Court held that illegally acquired physical evidence was admissible at trial for the purpose of impeaching the defendant's testimony. Relying on *Walder*, the Court, in Harris v. New York, 401 U.S. 222, 225-26 (1971), ruled that a defendant's confession obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), could be introduced to impeach testimony given by a defendant on direct examination at trial. In Oregon v. Hass, 420 U.S. 714, 722 (1975), the Court extended the scope of *Harris* by holding that statements made by a defendant after receiving the *Miranda* warnings and after requesting to speak to an attorney were admissible for impeachment purposes. The Court so held despite the fact that *Miranda* requires police questioning to cease after an individual requests an attorney. In addressing the deterrent-effect argument, the *Hass* Court found that "there is

pression hearing testimony for impeachment purposes would give new substance to the Court's previously expressed warning that "[t]he protective shield of Simmons is not to be converted into a license for false representations."[135]

On the other hand, such a decision would serve to resurrect partially the "intolerable" conflict between the privilege against self-incrimination and the proper exercise of fourth amendment rights which mandated the decision in *Simmons*.[136] A modification of the "use" immunity[137] provided in *Simmons*, however, would seem to be the next logical step for the Court to take if it continues to follow the reasoning of its recent standing decisions. Such a ruling would be especially important in light of the abolition of automatic standing in *Salvucci*, since a defendant must now testify in order to establish a legitimate

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sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief." *Id.* at 722. In 1980, the Court took *Harris* a step further by holding, in United States v. Havens, 446 U.S. 620, 627-28 (1980), that it was permissible to use illegally obtained evidence to impeach statements made by a defendant in response to the prosecution's cross-examination, provided the questions were reasonably suggested by the defendant's direct examination.

In contrast to these holdings, the Court has, in another fifth amendment context, refused to allow certain pretrial testimony to be used for purposes of impeachment. In New Jersey v. Portash, 440 U.S. 450, 459-60 (1979), the Court ruled that the use of a person's grand jury testimony, given in response to a grant of immunity, to impeach his later testimony at trial was a violation of the privilege against self-incrimination. While one can readily analogize the grant of immunity in *Portash* to the use immunity provided by *Simmons v. United States, see* note 137 *infra*, it is unclear to what extent the Court would follow this reasoning over that outlined in *Walder* and *Harris* when considering the use of suppression hearing testimony for impeachment purposes.

[135] United States v. Kahan, 415 U.S. 239, 243 (1974). In Harris v. New York, 401 U.S. 222 (1971), the Supreme Court, in wording analogous to that used in *Kahan*, stated: "The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id.* at 226.

[136] The *Simmons* Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." 390 U.S. at 394; *see* text accompanying notes 24 through 27 *supra*.

[137] "Use" immunity affords a witness protection from use of the pretrial testimony in a subsequent prosecution, but does not preclude prosecution on the crime to which the evidence relates. It is thus distinct from "transactional" immunity which prohibits prosecution of the witness for crimes to which his testimony relates but allows the Government to use such testimony against the witness on other charges. Kastigar v. United States, 406 U.S. 441, 443 (1972); Comment, *Grand Jury Immunity in Mississippi*, 49 MISS. L.J. 591, 591-92 (1978).

For a discussion of considerations involved in resolving conflicts between constitutional guarantees, see Note, *Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings*, 76 COLUM. L. REV. 674, 694-712 (1976).

expectation of privacy in an item seized, even when charged with a crime of possession.[138] As it now stands, the prosecution enjoys a tactical advantage with the removal of the *Jones* protection, since "the opportunity for cross-examination at the suppression hearing may enable the prosecutor to elicit incriminating information beyond that offered on direct examination,"[139] thus aiding the prosecution in developing its case and determining its trial strategy.[140] If the use of suppression hearing testimony for impeachment were allowed, a defendant who earlier admitted possession of property in order to be able to contest its seizure would almost be forced to avoid testifying at trial.[141] If the purpose of the automatic standing rule was to eliminate conflict between provisions of the Bill of Rights, and if *Salvucci* abolished automatic standing because the self-incrimination dilemma was cured in *Simmons,* then the extent to which *Simmons* realistically offers protection to a defendant who wishes to testify in his own behalf should be reexamined.

B. United States v. Payner *and the Supervisory Powers*

As has been noted, the Supreme Court has expressly refused in the recent past to extend fourth amendment standing to parties other than the immediate victim of the illegal search and seizure.[142] The Court's determination to apply this principle rigidly was reflected in its 1980 decision in *United States v. Payner.*[143] In this case, an Internal Revenue Service agent made an illegal seizure of a briefcase belonging to an officer of a Bahamian bank and copied numerous documents in it. Information obtained from the documents led to the indictment and

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[138] *See* United States v. Salvucci, 448 U.S. at 95-97 (Marshall, J., dissenting) (abolition of automatic standing means benefit to prosecutors). *But see* United States v. Molina-Garcia, 634 F.2d 217, 221 (5th Cir. 1981) (Tate, J., concurring) (abolition of automatic standing does not mean that defendants must formally take the stand at suppression hearing when their expectation of privacy in a certain item or location is self-evident).

[139] 448 U.S. at 96.

[140] *Id.*

[141] One legal commentator has described the current state of the law in this area as "a system that polices the police with exclusionary rules depriving the court of evidence and polices the defendant with an impeachment exception that may deprive the court of the defendant's testimony." *The Supreme Court, 1979 Term,* 94 HARV. L. REV. 77, 87 (1980).

[142] *See* Rakas v. Illinois, 439 U.S. at 132-38 (rejection of target theory); Alderman v. United States, 394 U.S. at 174-75 (rejecting vicarious standing by finding the benefits of deterrence to be outweighed by the costs of exclusion).

[143] 447 U.S. 727 (1980).

prosecution of Payner, a customer of the bank, on tax evasion charges.[144] Although the lower courts found that no fourth amendment rights of the defendant were violated by the illegal seizure, the evidence was excluded at trial. The courts determined that the government's knowing, willful, and bad-faith violation of the bank officer's constitutional rights required the exclusion of the evidence by virtue of the inherent supervisory powers of the federal courts.[145] The Supreme Court reversed. The Court, after holding that the defendant lacked standing,[146] ruled that the prohibition on vicarious standing applied with equal force when a court sought to exercise its supervisory powers on an exclusionary issue as when the court analyzed the question under the fourth amendment.[147] The Court thus rejected the dissent's contention that the federal courts should not sanction the deliberate and intentional violation of the law of search and seizure by the government, despite the inability of a particular defendant to challenge the action himself.[148] The effect of *Payner* is to preclude federal courts from accomplishing themselves what the Supreme Court, by virtue of the restrictions placed on standing, has refused to allow individual defendants to accomplish. The decision also opens the door for considerable criticism of the Court's restrictive approach to standing.[149] Since a defendant cannot use the exclusionary rule to contest evidence obtained through violation of a third party's rights, and since the Court in *Payner* determined the scope of the supervisory powers simply by reference to the balance of interests involved in applying the exclusionary rule,[150] the invitation to law enforcement personnel to violate the rights of third parties in order to obtain evidence for possible use against the target of an investigation is undeniably present.[151] Unscrupulous lawmen may be encouraged to manipulate the standing limita-

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[144] *Id.* at 729-30.

[145] *Id.* at 730-31.

[146] The Court determined that Payner had no expectation of privacy in the seized bank documents and thus was unable to show the violation of a fourth amendment right. *Id.* at 731 & n.4, 732.

[147] *Id.* at 733-36.

[148] *Id.* at 746-48 (Marshall, J., dissenting).

[149] *See* Rakas v. Illinois, 439 U.S. at 132-38 (rejecting the target theory).

[150] 447 U.S. at 736; *see* note 147 and accompanying text *supra.*

[151] Justice Marshall, dissenting in *Payner*, quoted the district court's determination that "the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties, who are the real targets of the governmental intrusion." 447 U.S. at 748 (quoting United States v. Payner, 434 F. Supp. 113, 132-33 (N.D. Ohio 1977)).

tions by increasing the number of illegal searches of third parties whom they have no intention of actually prosecuting.[152] The Court's refusal to discourage such activities by virtue of the supervisory powers in a case where the government's intentional misconduct was described by the lower court as "flagrantly illegal"[153] causes one to question how the Court will react to the resulting taint placed on the judicial process. The Supreme Court should either restrict *Payner* to exclude cases involving a deliberate manipulation of the standing limitation or develop other measures to ensure that the integrity of the judicial system is not endangered by the Court's reluctance to enforce the spirit, if not the letter, of the law under the fourth amendment.[154]

Conclusion

The exclusionary rule has now been applicable to federal courts for almost seventy years and to the state courts for twenty years.[155] The controversy[156] surrounding the rule today reflects the various opinions voiced regarding its effectiveness in deterring illegal police conduct while still preserving the societal interest in the successful curtailment of criminal conduct. The Supreme Court's apparent determination to use the standing requirement as a procedural restraint on a substantive rule that has been subject to extensive criticism ignores the problems inherent in the rule itself and tends to encourage the very type of behavior which the rule originally was designed to combat.[157] The narrowly-structured application of the legitimate expectation of privacy requirement, the failure of the Court to consider properly one's ownership of a seized item, the abolition of the automatic standing doctrine, and the discarding of the legitimately on the premises test all operate to deny protection to individuals who, if only in an indirect

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[152] Justice White, dissenting in *Rakas*, made a similar determination with regard to stops of automobiles by law enforcement officials on the chance that an illegal search would turn up evidence which a mere passenger would be unable to suppress. *See* note 104 and accompanying text *supra*.

[153] 447 U.S. at 729.

[154] For a discussion of criteria which would aid the court in determining when the exercise of the supervisory powers in a *Payner*-like situation would be appropriate, see *The Supreme Court, 1979 Term*, 94 Harv. L. Rev. 77, 194-96 (1980).

[155] *See* note 1 *supra*.

[156] For an update on judicial and legislative dissatisfaction with the exclusionary rule, see Moya, *Picking On the Poisonous Fruit*, Nat'l L.J., June 8, 1981, at 1, col. 1; Nat'l L.J., June 22, 1981, at 9, col. 3; Graynor & Gross, *Recent High Court Jousts With the Exclusionary Rule*, Nat'l L.J., Nov. 9, 1981, at 26, col. 1.

[157] *See* note 2 and accompanying text *supra*.

way, have traditionally been regarded as victims of illegal government action. The strong emphasis placed on a defendant's property and possessory interests in the area searched unfairly limits the number of defendants entitled to contest illegal action because it assumes that citizens conduct their affairs by means of formalistic proof of territorial control rather than by common sense understandings developed to meet the realities of everyday living.[158] While the Court's concern over the operation of the exclusionary rule is understandable, the solution should be an examination of the rule itself, and not a limitation on the number of people entitled to invoke the rule. Until the Court adopts some equally effective means of discouraging unreasonable searches and seizures, all citizens, whether innocent or guilty, necessarily must depend on access to the exclusionary rule in order to preserve the rights granted them under the fourth amendment.

Douglas J. Gunn

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[158] *See* State v. Alston, 87 N.J. 531, 436 A.2d 81, 88-89 (1981) (legitimate expectation of privacy standard produces results contrary to individual's actual expectations); notes 103, 108 and accompanying text *supra*.

THE DIVISIBLE DIVORCE DOCTRINE REEXAMINED IN LIGHT OF *SHAFFER V. HEITNER*

State courts have held repeatedly that the jurisdictional predicates for a divorce are met if at least one of the spouses involved is domiciled within the forum state.[1] The absent spouse's contacts, if any, with the forum are not considered. Although this practice has been found to be constitutional in the past,[2] this comment will demonstrate that granting a divorce without considering the absent spouse's contacts with the forum[3] cannot be reconciled with the United States Supreme Court's reasoning in *Shaffer v. Heitner*[4] and its progeny.[5] It will also show that the failure to apply the minimum contacts standard elucidated in *International Shoe Co. v. Washington*[6] is often unfair to the absent spouse and that the mere domicile of one spouse within the forum state is insufficient to meet that standard.[7]

I. Development of State Court Jurisdictional Theory

For almost a century, Justice Field's opinion in *Pennoyer v. Neff*[8] provided the conceptual framework in which problems of state court jurisdiction were cast.[9] *Pennoyer* invalidated a default judgment against a nonresident defendant who did not receive personal service of process.[10] Two fundamental problems were presented to the Court in this case: providing assurance that the defendant will have reasonable

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[1] *See, e.g.*, Wood v. Wood, 100 Idaho 387, 597 P.2d 1077, 1079 (1979) (in personam jurisdiction unnecessary to dissolve marriage); Butler v. Butler, 577 S.W.2d 501, 505 (Tex. Civ. App. 1979) (same).

[2] Vanderbilt v. Vanderbilt, 354 U.S. 416, 417-18 (1957); Williams v. North Carolina, 317 U.S. 287, 298-99 (1942) (Williams I); Pennoyer v. Neff, 95 U.S. 714, 734-35 (1877).

[3] *See* cases cited at note 88 and accompanying text *infra*.

[4] 433 U.S. 186 (1977).

[5] Rush v. Savchuk, 444 U.S. 320 (1980); World-Wide Volkswagon v. Woodson, 444 U.S. 286 (1980); Kulko v. California Super. Ct., 436 U.S. 84 (1978).

[6] 326 U.S. 310 (1945).

[7] The only state court that has applied the minimum contacts standard to divorce proceedings found the domicile of the plaintiff in the forum state sufficient to meet due process requirements. *In re* Rinderknecht, 367 N.E.2d 1128, 1134-35 (Ind. Ct. App. 1977).

[8] 95 U.S. 714 (1877).

[9] *See generally* Hazard, *A General Theory of State-Court Jurisdiction*, 1965 Sup. Ct. Rev. 241, 241-43 (discussing endurance of *Pennoyer* rationale).

[10] 95 U.S. at 734.

notice of the action against him and restricting the judicial power of the states to matters that are of proper local concern.[11] In formulating the solution to these problems the Court distinguished between actions in personam and actions in rem.[12] The Court held that in personam jurisdiction could be obtained by a state court only if the defendant was both within the state's territory and personally served with notice.[13] Similarly, in rem jurisdiction could be obtained only if the property or *res* was both within the state's territory and the state court seized the property.[14]

The majority opinion in *Pennoyer* explicitly adopted the territorial jurisdiction theory expressed by Justice Story in his writings on the conflict of laws.[15] Under this theory, a judgment rendered by a state court is binding only upon those over whom the state court has the power to enforce the judgment.[16] Since a state is sovereign only within its territorial boundaries, it has the power to enforce its judgments only against persons or property within its borders.[17] Story's power theory of state court jurisdiction was consistent with nineteenth century legal positivism, which posited that a law was valid only if formulated by a sovereign with the power to enforce it.[18]

The power, or territorial, theory of state court jurisdiction provided a logical, mechanical, and efficient process for determining

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[11] Hazard, *supra* note 9, at 245.

[12] 95 U.S. at 724. Courts have traditionally distinguished three types of jurisdiction. In personam jurisdiction involves personal liability or obligations. In rem jurisdiction involves the interests of all persons in property. Quasi in rem jurisdiction involves the interests of particular persons in property. *See* Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1957) (defining in personam, in rem, and quasi in rem jurisdiction).

[13] 95 U.S. at 722-27.

[14] *Id.*

[15] *Id.* at 722-24. Story pointed out that a state has exclusive sovereignty and jurisdiction only within its territory. Consequently, he reasoned that a state's laws can bind only persons and property within its territory. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19-21 (1834). In formulating this proposition, Story ignored American and English precedent inconsistent with his views. *See, e.g.*, Massie v. Watts, 10 U.S. (6 Cranch) 148, 155-60 (1810) (decree compelling transfer of interest in land located outside jurisdiction); Penn v. Lord Baltimore, 1 Ves. 444, 27 Eng. Rep. 1132, 1139 (Ch. 1750) (affirming decree determining property interests outside territorial limits of court).

[16] In McDonald v. Mabee, 243 U.S. 90 (1917), the Court stated that "[t]he foundation of jurisdiction is physical power." *Id.* at 91.

[17] 95 U.S. at 722-24.

[18] One of the most important works on legal philosophy written in the nineteenth century was John Austin's THE PROVINCE OF JURISPRUDENCE DETERMINED (1832), which propounded a theory of law based upon sovereignty. *Id.* at 191-361, *discussed in* H. HART, THE CONCEPT OF LAW 18-25 (1961).

whether it was proper for a court to assert its jurisdiction. When litigation arose involving absent individuals[19] and corporations,[20] however, practical realities often dictated an expansion of state courts' jurisdictions beyond their borders. To meet these realities without abandoning *Pennoyer's* rationale, the Court developed legal fictions such as the doctrine of implied consent and the presence theory.[21]

In *Harris v. Balk*[22] the doctrine of quasi in rem jurisdiction was promulgated, dramatically expanding the scope of state court jurisdiction. Harris, a North Carolina resident, owed a debt to Balk, also a resident of North Carolina. While Harris was visiting Maryland, Epstein, a creditor of Balk, attached the debt.[23] Rejecting the theory that jurisdiction depended upon the original situs of the debt, the Court held there was jurisdiction to attach the debt in any state where the debtor could be found.[24] *Pennoyer* would have required the court to

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[19] For instance, to ensure that nonresident motorists answered for automobile accidents within their territory, some states enacted laws providing their courts with jurisdiction over nonresident motorists for claims arising within the state. *See generally* Jax, *Non-Resident Motorists Service of Process Acts*, 33 F.R.D. 151, 153-54 (1963) (discussing the speed with which statutes were enacted). In Hess v. Pawloski, 274 U.S. 352 (1927), the Supreme Court approved the constitutionality of a nonresident motorist statute, reasoning that nonresident motorists impliedly consent to the state court's jurisdiction when they use the state's roads. *Id.* at 356. Later, the Court held that notice must be sent to the absentee motorist. Wuchter v. Pizzutti, 276 U.S. 13, 19 (1928).

Another problem arose when a domiciliary of the forum state was absent from the forum. Milliken v. Meyer, 311 U.S. 457 (1940), abrogated the force of *Pennoyer's* territorial restrictions by allowing a court to assert jurisdiction over an absent domiciliary. *Id.* at 462-64.

[20] The early view, that a corporation could be sued only where it was incorporated, caused a great deal of inconvenience and injustice. St. Clair v. Cox, 106 U.S. 350, 355 (1882). To resolve this problem, the Court theorized that since a state may impose conditions upon a corporation's doing business in the state, it may also require that a corporation doing business in the state consent to service of process in litigation arising out of its business activities. *Id.* at 356.

In other cases, the Court found that a foreign corporation doing business in the state was *present* within the state and therefore subject to the state court's jurisdiction. *See* International Harvestor Co. v. Kentucky, 234 U.S. 579, 589 (1914) (presence of corporation in state necessary for service of process); Green v. Chicago, B. & Q. Ry., 205 U.S. 530, 532 (1907) (validity of service depends upon whether corporation was doing business in such manner as to be deemed present in state). *See generally* 29 Miss. L.J. 91 (1957) (discussing in personam jurisdiction over foreign corporations).

[21] *See* notes 19 and 20 *supra*.

[22] 198 U.S. 215 (1905).

[23] *Id.* at 216.

[24] *Id.* at 222-23. To protect the absent creditor, the debtor-garnishee must give him notice of the action and an opportunity to defend. The absence of such notice prevents the debtor-garnishee from asserting payment of the judgment as a defense in a subse-

seize the property in an in rem proceeding to give the owner notice of the action.[25] But since a debt or other intangible cannot be seized physically, *Harris* achieved the same end by requiring the garnishor to give the debtor, through service of process, notice of both the suit and the obligation to refrain from paying the debt.[26]

International Shoe Co. v. Washington[27] was the Court's first major departure from the *Pennoyer* doctrine. There the issue was whether the state of Washington could obtain in personam jurisdiction in a Washington court over a Delaware corporation.[28] Arguably, the Court could have used the presence theory to uphold the state court's jurisdiction.[29] The Court reasoned, however, that the presence theory failed to address the true issue, whether the corporation's activities within the state were enough to meet due process requirements for in personam jurisdiction.[30] Due process was satisfied, the Court stated, only if the defendant had minimum contacts with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[31]

The minimum contacts standard set forth in *International Shoe* was significantly clarified in *Hanson v. Denckla*.[32] Although acknowledging the trend toward more expansive in personam jurisdiction over nonresident defendants,[33] the Court warned that it would be error to assume that this trend would eventually lead to the abolition of all

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quent action by his debtor. *Id.* at 227.

[25] 95 U.S. at 727.

[26] 198 U.S. at 233.

[27] 326 U.S. 310 (1945).

[28] *Id.* at 311-12.

[29] Although the defendant corporation's principal place of business was not in Washington, the activities of its salesmen resulted in a continuous flow of the corporation's product into the state. *Id.* at 313-14. Probably, this fact would have justified a finding that the corporation was present within the forum. *Cf.* International Harvestor Co. v. Kentucky, 234 U.S. 579, 587 (1914) (continuous flow of defendant's machines into state sufficient to show presence).

[30] 326 U.S. at 316-17. Earlier, Judge Learned Hand, writing for the Second Circuit Court of Appeals, had characterized the word "presence" as a shorthand for the real consideration in issue—the inconvenience of requiring the corporation to defend a suit in the forum state. Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930).

[31] 326 U.S. at 316.

[32] 357 U.S. 235 (1958).

[33] *Id.* at 251. In McGee v. International Life Ins. Co., 355 U.S. 220 (1957), the Court stated that expansion of in personam jurisdiction was necessitated by the increased flow of interstate commerce. Also, nonresidents could more easily defend suits because of improved transportation and communications. *Id.* at 222-23.

restrictions upon in personam jurisdiction.[34] The Court held that due process required that the defendant must have purposely availed himself of the benefits and protections of the laws of the forum state before he could be subjected to a judgment in personam.[35] *Hanson* also reiterated the rule that in rem jurisdiction is based upon the presence of the property within the forum state,[36] thus indicating that *International Shoe* had no effect upon the Court's acceptance of the *Pennoyer* rules governing in rem jurisdiction.[37]

Subsequent lower court decisions suggested that the in personam-in rem distinction should be abolished and the minimum contacts standard should be applied to all assertions of state court jurisdiction.[38] For instance, Judge Gibbons, concurring in *Jonnet v. Dollar Savings Bank*,[39] noted that the limitation of fundamental fairness applied to any exercise of state judicial power, whether it was in personam, in rem, or quasi in rem.[40] Gibbons persuasively criticized post-*International Shoe* court decisions which, upon finding the contacts necessary for in personam jurisdiction lacking, proceeded to discuss the fictional situs of intangibles rather than drawing the logical conclusion that the state was without power to hear the case.[41]

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[34] 357 U.S. at 251.

[35] *Id.* at 253.

[36] *Id.* at 246. The harshness of the in rem doctrine was diminished by the Court's decision in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). In that case, the Court held that due process requires that the notice given to the defendant be reasonably calculated to apprise him of the pendency of the action whether the action is in personam or in rem. *Id.* at 312-14.

[37] *See* text accompanying note 14 *supra*.

[38] *See, e.g.*, United States Indus., Inc. v. Gregg, 540 F.2d 142, 154 (3d Cir. 1976) (*International Shoe* applies to quasi in rem actions); Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1130-43 (3d Cir. 1976) (Gibbons J., concurring) (irrational to bifurcate *International Shoe's* jurisdictional doctrine). *See generally* Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 660-64 (1959) (examining the illogic of the in personam-in rem distinction).

[39] 530 F.2d 1123 (3d Cir. 1976).

[40] *Id.* at 1137. Gibbons pointed out that the Supreme Court cases upholding the validity of state courts' assertion of jurisdiction in foreign attachment were decided before *International Shoe*. *Id.* at 1131-32. He cited Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 311-13 (1950) as an example of the Court applying the same due process considerations to actions in rem as are applied to actions in personam. 530 F.2d at 1136-37.

[41] 530 F.2d at 1137 (criticizing Steele v. G.D. Searle & Co., 483 F.2d 339, 344-49 (5th Cir. 1973)) (applying the quasi in rem doctrine), *cert. denied*, 415 U.S. 958 (1974); Minichiello v. Rosenberg, 410 F.2d 117, 118-19 (2d Cir. 1968) (en banc) (recognizing the continuing validity of *Harris v. Balk*), *cert. denied*, 396 U.S. 844 (1969).

The Supreme Court's decision in *Shaffer v. Heitner*[42] signaled the total demise of the *Pennoyer* doctrine. There, the Court held that all assertions of state court jurisdiction must meet the *International Shoe* standard.[43] After tracing the history of state court jurisdictional law,[44] the Court, in an opinion by Justice Marshall, noted that since *Pennoyer* had been seriously eroded, the time was ripe to consider whether *International Shoe's* minimum contacts requirement should be applied to in rem actions.[45] The Court reasoned that "jurisdiction over a thing" was in fact a shorthand method of referring to "jurisdiction over the interests of a person in a thing."[46] Since the standard for determining whether there is jurisdiction over the interests of a person is the minimum contacts test, the Court concluded that this standard also should be applied in cases traditionally classified as in rem.[47] This conclusion was buttressed by the inherent unfairness of the in rem doctrine's actual application.[48]

The Court noted that certain in rem actions, such as disputes concerning competing claims to land, would not be affected by its holding, since in these cases the requisite contacts with the forum state were likely to be found.[49] The Court also stated that the particularized rules governing adjudications of status might be found to be consistent with the standard of fairness.[50]

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[42] 433 U.S. 186 (1977).

[43] *Id.* at 212.

[44] *Id.* at 205.

[45] *Id.* at 206.

[46] *Id.* at 207 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56, Introductory Note (1971)).

[47] 433 U.S. at 207.

[48] *Id.* at 212. Just as the territorial jurisdiction theory of *Pennoyer* was consistent with the prevailing legal philosophy of the nineteenth century, *see* note 18 and accompanying text *supra*, *Shaffer's* emphasis on fairness to the defendant is consistent with current legal philosophy. Currently, John Rawls' theory of "justice as fairness" has displaced older, more legalistic theories. *See* J. RAWLS, A THEORY OF JUSTICE (1971), *reviewed in* Neumaier, Book Review, 47 MISS. L.J. 827 (1976). *See generally* C. Kaufman, *The Nature of Justice: John Rawls and Pure Procedural Justice*, 19 WASHBURN L.J. 197 (1980) (comparing Rawls' position with other contemporary theories).

[49] 433 U.S. at 207-08. The Court also mentioned as possible exceptions situations in which the suit arises out of injuries occurring on the property of an absentee landowner or in which ownership is conceded but the suit relates to rights and duties arising out of that ownership. *Id.* at 208. The Court noted that the most drastic effect of its holding would be on quasi in rem actions involving property having no relationship to the issues involved in the litigation. *Id.* at 208-09.

[50] *Id.* at 208 n.30. Footnote 30 states: "We do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness." *Id.* (citing Traynor,

The Supreme Court's post-*Pennoyer* decisions, culminating in *International Shoe*, evidenced a trend toward a more expansive view of state court jurisdiction.[51] *Shaffer* and its progeny, on the other hand, signal a trend toward more stringent restrictions on the states.[52]

The Court's first post-*Shaffer* decision was *Kulko v. California Superior Court*.[53] There the Court held that the California courts did not have in personam jurisdiction in a child support action over the nonresident father of minor children domiciled in California.[54] Applying what it described as an "effects" test, the California Supreme Court had upheld the trial court's assertion of jurisdiction, reasoning that the father had purposely availed himself of the benefits and protection of California's laws by sending one child to live with his mother in California and consenting to the permanent residence of his child in the state.[55] The United States Supreme Court, however, rejected the California Supreme Court's reasoning. The Court pointed out that the father had merely acquiesced to the unilateral decisions of his children and that the unilateral activity of a person claiming a relationship with a defendant is not a contact with the forum.[56] Nor were the effects of the father's acquiescence a sufficient basis for jurisdiction, since they were non-commercial and caused no injury within the forum.[57] The Court also rejected the argument that California's state interest in the

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supra note 38, at 660-61 (1957) (suggesting that ex parte divorces might be valid without the in rem fiction because of relationship between the defendant, the forum, and the litigation)).

[51] *See* notes 19 through 31 and accompanying text *supra*.

[52] *See* notes 42 through 50 and accompanying text *supra;* notes 53 through 64 and accompanying text *infra*.

[53] 436 U.S. 84 (1978).

[54] *Id.* at 96.

[55] Kulko v. California Super. Ct., 19 Cal. 3d 514, 524-25, 564 P.2d 353, 357-58, 138 Cal. Rptr. 586, 590-91 (1977), *rev'd*, 436 U.S. 84 (1978).

[56] 436 U.S. at 93-94 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

[57] 436 U.S. at 96. The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37, at 156 (1971) explains the "effects" test in the following language:

> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

Noting it was not bound by the Restatement, the Court reasoned that the "effects" test was improperly applied because the test covers only those situations in which a defendant either causes injury within the forum or conducts commercial activities there. 436 U.S. at 96 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37, Comment a (1971)).

welfare of its resident children was a basis for jurisdiction.[58] In addition, the Court emphasized that considerations of fairness weighed in favor of the father's state of domicile as the proper forum.[59]

In *Rush v. Savchuk*,[60] the Supreme Court quashed a Minnesota resident's attempt to obtain quasi in rem jurisdiction in the Minnesota courts over an Indiana resident.[61] Savchuk was injured in an automobile accident in Indiana while riding as a passenger in Rush's car. Later, he moved to Minnesota and filed a negligence action against Rush in a Minnesota court.[62] Since Rush had no contacts with Minnesota, Savchuk attempted to obtain jurisdiction by attaching Rush's insurance policy; Rush's insurer was licensed to do business in Minnesota. The Minnesota Supreme Court held that Rush's insurance policy was a garnishable *res* for the purpose of obtaining quasi in rem jurisdiction.[63] The United States Supreme Court, however, concluded that since an obligation owed an absent defendant is not a contact with the forum, the Minnesota courts could not constitutionally assert jurisdiction.[64]

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[58] 436 U.S. at 98. California had not displayed a particularized interest by enacting a special jurisdictional statute. In addition, under California's version of the Revised Uniform Reciprocal Enforcement of Support Act of 1968, the mother could have filed a petition in California and had the case adjudicated in a New York court without either party having to leave his own state. CAL. CIV. PROC. CODE §§ 1650-1699 (West 1980).

[59] 436 U.S. at 97. The father had remained in New York, the state of marital domicile, while the mother had moved across the nation. In addition, the Court noted that a reasonable parent would not expect that permitting a child to join his mother would subject the parent to the expense and strain of defending a suit 3,000 miles across the country. *Id.* at 97-98.

[60] 444 U.S. 320 (1980).

[61] *Id.* at 327-33.

[62] *Id.* at 322. Savchuk could not have successfully brought suit in Indiana because of Indiana's automobile guest statute. *See* IND. CODE ANN. § 9-3-3-1 (Burns 1980) (auto guest statute).

[63] 444 U.S. at 323-24. An obligation owed by an insurance company to an insured could be attached if the insurer did business in the forum state under the rule stated in Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 314, 269 N.Y.S.2d 99, 101-02 (1966). In O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978), the court held that *Seider*-type attachment was not invalidated by *Shaffer* because the obligation to pay insurance was not unrelated to the cause of action. 579 F.2d at 197-202.

[64] 444 U.S. at 327-33. In World-Wide Volkswagon Corp. v. Woodson, 440 U.S. 286 (1980), decided on the same day as *Rush*, the Court held that a New York defendant who sold automobiles capable of use in Oklahoma did not have sufficient contacts with Oklahoma to fall within the jurisdiction of the Oklahoma courts in a products liability case. *Id.* at 299, *noted in* 51 MISS. L.J. 121 (1981).

II. Jurisdiction in Domestic Relations Cases

Pennoyer v. Neff[65] explicitly stated that state courts had the right to grant a divorce to a domiciliary even when the other spouse was absent from the forum.[66] The exercise of this right, however, was severely restricted by the Supreme Court's decision in *Haddock v. Haddock*.[67] There the Court held that an ex parte divorce decree granted in a state other than the state of matrimonial domicile was not constitutionally entitled to full faith and credit in other states. *Haddock* left to each state the decision of whether such a decree would be enforceable within its borders.[68]

Haddock was overruled by *Williams v. North Carolina* (*Williams I*).[69] The Court in *Williams I* concluded that even when one spouse was absent from the forum, the state's high interest in the marital status of its domiciliaries justified the state court's exercise of jurisdiction.[70] The Court conditioned its holding, however, by requiring substituted service of process on the absent spouse sufficient to meet due process standards.[71]

In reaching its decision, the Court had difficulty characterizing the nature of the proceeding. Although it expressly rejected the view that a divorce action is an in rem proceeding, the Court reasoned that divorce is not an in personam proceeding either, since, unlike other in personam actions, the plaintiff's domicile in the forum is required to ob-

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[65] 95 U.S. 714 (1877).

[66] *Id.* at 735. The Court reasoned that if the rule were otherwise, a spouse would often be left without a remedy for breach of the marital contract. This situation would arise, for example, when a spouse is guilty of desertion and is no longer present within the forum. *Id.*

[67] 201 U.S. 562 (1906).

[68] *Id.* at 605-06. The U.S. Const. art. IV, § 1 provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." A sister state is required to recognize the judgment of another state only if it is a valid judgment. Restatement (Second) of Conflict of Laws § 93 (1971).

[69] 317 U.S. 287 (1942). The Williams obtained ex parte divorces in Nevada from their spouses, both of whom resided in North Carolina. They then married each other and returned to North Carolina where they were convicted of bigamy. The state contended that since neither of the defendants to the divorce actions were personally served and since they did not make a general appearance, the divorce decrees were invalid in North Carolina. *Id.* at 289-90.

[70] *Id.* at 298-99. The Court noted in particular the state's interest in preventing polygamous marriages and protecting innocent children from being considered illegitimate. *Id.* at 303.

[71] *Id.* at 299. Substituted service is sufficient to meet the requirements of due process if it is reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard. Milliken v. Meyer, 311 U.S. 457, 463 (1940).

tain jurisdiction.[72] In dissent, Mr. Justice Jackson complained that, despite the Court's refusal to classify divorce as an in rem action, the majority's holding seemed to be based on the idea that the marital *res* follows a spouse from state to state.[73]

In later cases, the Court developed the divisible divorce doctrine, which allows a court to grant a divorce without obtaining in personam jurisdiction over the defendant spouse, but requires a court to obtain in personam jurisdiction over the defendant before adjudicating issues affecting his property interests.[74] Although the Court in *Williams I* expressly rejected the theory that a divorce action is a proceeding in rem,[75] the divisible divorce doctrine has precisely this effect, since it allows a court to assert jurisdiction over the marital status, as if it were a *res*, without obtaining in personam jurisdiction.[76] Apparently, the Court's rationale is that a divorce affects only a status and does not involve any personal rights of the defendant.[77] Several state courts have been more candid and have expressly designated divorce actions as proceedings in rem.[78]

The divisible divorce doctrine first emerged in *Estin v. Estin*.[79] There the Court held that although a Nevada court could grant Estin a divorce from his wife, it could not determine his wife's rights to alimony without obtaining in personam jurisdiction over her.[80] In *May v.*

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[72] 317 U.S. at 297.

[73] *Id.* at 316 (Jackson, J., dissenting). In Williams v. North Carolina, 325 U.S. 226 (1944) (Williams II), the Court held that the finding of domicile upon which the court's jurisdiction was based could be challenged in a subsequent proceeding. *Id.* at 232.

Sherrer v. Sherrer, 334 U.S. 343 (1948), limited subsequent relitigation to ex parte divorces by holding that a person who was a party to the first proceeding could not collaterally attack the finding of jurisdiction in a subsequent proceeding. *Id.* at 349-52.

Johnson v. Muelberger, 340 U.S. 581 (1951), held that a third party could not attack the jurisdictional finding unless the law of the state where the divorce was granted permitted such an attack. *Id.* at 586.

[74] *See, e.g.*, Vanderbilt v. Vanderbilt, 354 U.S. 416, 417-18 (1957) (state court cannot adjudicate wife's right to alimony without in personam jurisdiction over her); Estin v. Estin, 334 U.S. 541, 548-49 (1948) (same).

[75] 317 U.S. at 297.

[76] *See* H. CLARK, LAW OF DOMESTIC RELATIONS 316 (1968) (Supreme Court has adhered to in rem-in personam distinction in divorce cases).

[77] *See* Estin v. Estin, 334 U.S. 541, 546-49 (1948) (when personal rights affected, in personam jurisdiction necessary).

[78] *See, e.g.*, Wood v. Wood, 100 Idaho 387, 597 P.2d 1077, 1079 (1979) (divorce is action in rem); Comisky v. Comisky, 597 S.W.2d 6, 8-9 (Tex. Civ. App. 1980) (same).

[79] 334 U.S. 541 (1948).

[80] *Id.* at 546-49. The Nevada divorce decree made no provision for alimony, although under a prior New York separation decree, Joseph Estin was obligated to pay alimony. *Id.* at 542-43. The Court found that Nevada could properly assert jurisdiction

Anderson[81] the Court extended the divisible divorce doctrine to cases involving child custody.[82] A Wisconsin court granted a divorce decree and, without obtaining in personam jurisdiction over the mother, awarded custody of the couple's children to the father.[83] The Supreme Court invalidated the custody decree, reasoning that since a mother's personal right to custody is even more important than the alimony right discussed in *Estin,* it should be accorded equal protection.[84]

In *Shaffer v. Heitner,*[85] the Court stated in dictum that the divisible divorce doctrine *may* be consistent with *International Shoe's* standard of fairness.[86] Since *Shaffer,* however, the Court has not reconsidered the constitutionality of the divisible divorce doctrine. Moreover, with one exception,[87] state court decisions after *Shaffer* have continued to treat divorce actions as in rem proceedings without discussing *International Shoe's* standards.[88] The exception was *In re Rinderknecht,*[89] a decision by the Court of Appeals for the First District of Indiana,[90] which reexamined the divisible divorce doctrine in light of *Shaffer.*[91] Although noting that *Shaffer* required the application of *International*

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to grant the divorce because of the state's high interest in the marital status of its domiciliaries. *Id.* at 546-47 (citing Williams v. North Carolina, 317 U.S. 287, 298-99 (1942)). Nevada could not, however, determine the personal right of the defendant to receive alimony payments without first obtaining in personam jurisdiction over her. 334 U.S. at 548-49.

The Supreme Court reaffirmed *Estin* in Vanderbilt v. Vanderbilt, 354 U.S. 416, 417-18 (1957), which differed from *Estin* only in the fact that the wife's right to alimony had not been adjudicated prior to the divorce. *Id.* at 418.

[81] 345 U.S. 528 (1953).

[82] *Id.* at 528-35.

[83] *Id.* at 530-31.

[84] *Id.* at 533-34 (discussing Estin v. Estin, 334 U.S. 541, 548-49 (1948)).

[85] 433 U.S. 186 (1977).

[86] *Id.* at 208 n.30, *quoted at* note 50 *supra.*

[87] *In re* Rinderknecht, 367 N.E.2d 1128 (Ind. Ct. App. 1977).

[88] *E.g.,* Wood v. Wood, 100 Idaho 387, 579 P.2d 1077, 1079 (1979) (in personam jurisdiction unnecessary to dissolve marriage); Pitrowski v. Pitrowski, 97 Misc. 2d 755, 412 N.Y.S. 2d 316, 318-19 (Sup. Ct. 1979) (in rem jurisdiction over marital status); Butler v. Butler, 577 S.W.2d 501, 505 (Tex. Civ. App. 1978) (in personam jurisdiction unnecessary for divorce). *But cf.* Carr v. Carr, 46 N.Y.2d 270, 273, 385 N.E.2d 1234, 1236, 413 N.Y.S.2d 305, 307 (1978) (marital *res* cannot be used for jurisdiction after one spouse dies).

In a case involving the validity of an exercise of in personam jurisdiction in an action for child support, the Mississippi Supreme Court indicated that it too considers a divorce proceeding an in rem action. Fliter v. Fliter, 383 So. 2d 1084, 1087 (Miss. 1980).

[89] 367 N.E.2d 1128 (Ind. Ct. App. 1977).

[90] *Id.* at 1133-36.

[91] *Id.* at 1135.

Shoe's minimum contacts test to all assertions of state court jurisdiction, the court reasoned that a different level of contacts might be sufficient when an action affects only marital status.[92] It concluded that since the state had a high interest in the marital status of its domiciliaries, the residency of only one of the parties in the forum state met the minimum contacts requirement.[93] Thus, the *Rinderknecht* court, although purporting to apply the minimum contacts standard, reached essentially the same conclusion that other state courts have reached without applying the standard.[94]

III. Applying *International Shoe* to Divorce Actions: The Rationale

There are basically two lines of reasoning that could lead a court to conclude that the minimum contacts standard does not apply to actions affecting only the marital status. First, a court could reason that the presence of one spouse within the forum makes the marriage itself present within the forum. Assuming that a court has power over all things tangible or intangible that are present within its sovereign territory, it follows that a court has power over the marital status and thus can properly assert jurisdiction to dissolve that status.[95]

There are two fundamental errors in this line of reasoning. First, the territorial sovereignty theory of jurisdiction derived from *Pennoyer*,[96] which this argument assumes, is no longer viable. After *International Shoe* and *Shaffer* it is clear that neither the mere presence within nor absence from a forum of a person or thing is determinative of the jurisdictional question.[97] Second, even if the *Pennoyer* doctrine of territorial jurisdiction were still viable, it is questionable whether marital status is a thing, that can be present within a geographical ter-

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[92] *Id.* The Court reasoned that *Shaffer* had stated that divorce actions were among the in rem proceedings unaffected by its holding. *Id.* (citing Shaffer v. Heitner, 433 U.S. 186, 208 (1977)).

[93] 367 N.E.2d at 1135. The court quoted from the Supreme Court's opinion in Williams v. North Carolina, 317 U.S. 287 (1942) (Williams I), which held that North Carolina's high interest in the marital status of its domiciliaries justified the state's exercise of jurisdiction in a divorce action without in personam jurisdiction over one of the parties. 367 N.E.2d at 1135.

[94] *See* cases cited at note 88 *supra.*

[95] This is the rationale implicitly employed by the courts that classify divorce actions as in rem proceedings. *See* cases cited at notes 78 and 88 *supra.*

[96] *See* notes 14 through 18 and accompanying text *supra.*

[97] *See* Shaffer v. Heitner, 433 U.S. 186, 206 (1977) (*Pennoyer's* foundation not secure); International Shoe v. Washington, 326 U.S. 310, 316-17 (1945) (presence within forum not real issue).

ritory. Since a marriage is not a tangible thing it is as nonsensical to attempt to locate a marriage spatially, by asking "where is the marital *res*?," as it is to ask, "how much does the marriage weigh?"[98] A marriage does not have any sort of existence, tangible or intangible, independent of the parties to the relationship.[99] Like the words "debt" and "ownership," the word "marriage" is in fact a shorthand way of referring to a number of legal rights and duties two persons have with respect to each other and with respect to third parties.[100] A marriage itself, thought of as something other than these rights and duties, is simply nonexistent. Although some state courts perhaps are still influenced by *Pennoyer's* concepts, it is unlikely a modern state court would expressly rely on a presence theory to justify its assertion of jurisdiction in a divorce action.[101] There is a second argument that is more likely to be employed today. The minimum contacts standard is only applicable when personal rights of the defendant are involved. By denoting a divorce action as a proceeding in rem, some courts have concluded that such actions affect only the status itself, and do not affect personal rights of the defendant.[102]

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[98] The logical problems encountered in treating the marital status as a *res* were noted by Justice Jackson in his dissenting opinion in Williams v. North Carolina, 317 U.S. 287 (1942) (Williams I). For instance, why could the marital *res* not be located where the defendant rather than the plaintiff resides? Or, perhaps it could be located where each of the parties reside, giving one state the power to dissolve half the marriage, while the other state could uphold the validity of the other half. These types of dilemmas demonstrate the artificial nature of considering the marital status as a *res*, according to Justice Jackson. *Id.* at 316-17 (Jackson, J., dissenting).

[99] Confusion often results from a failure to pay careful attention to the function a word serves. If considering a marriage to be a thing served some useful function there would then be justification for this fiction. The *res* fiction in this context does nothing, however, except to promote unclear thinking and to divert the court's attention from important considerations. *See id.* at 317 (Jackson, J., dissenting) (thinking of marriage as a piece of land promotes unclear thinking).

[100] Justice Jackson defined marriage as follows:

> It might be more helpful to think of marriage as just marriage—a relationship out of which spring duties to both spouse and society and from which are derived rights,—such as the right to society and services and to conjugal love and affection—rights which generally prove to be either priceless or worthless, but which none the less the law sometimes attempts to evaluate . . . .

Id.

[101] Writing in 1965, Professor Hazard noted that the conceptual structure established by *Pennoyer* remained substantially intact. Hazard, *supra* note 9, at 241. Considering *Pennoyer's* dominance in legal thinking for almost a century, it is understandable that many courts are still unable to break free from its hold.

[102] *See, e.g.*, Ferrari v. Ferrari, 585 S.W.2d 546, 547-48 (Mo. Ct. App. 1979) (must have jurisdiction in personam to adjudicate economic aspects of marriage but not to ad-

The central flaw in this reasoning is that proceedings in rem do affect the personal rights of the defendant. This has long been recognized by some of the most respected legal commentators. Professor Hohfeld noted the error of understanding a proceeding in rem to be an action against a thing.[103] As Hohfeld stated, a person can sustain several types of physical relationships with a thing, but the only types of relationships that have legal significance are relationships between persons, since the purpose of the law is to regulate conduct between human beings.[104] Justice Holmes expressed the same view in *Tyler v. Court of Registration*[105] when he stated: "All proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends upon the number of persons affected."[106]

The argument that actions affecting status do not affect personal rights is not only illogical, it is also inconsistent with the line of reasoning adopted by the Supreme Court in *Shaffer v. Heitner*[107] and *May v. Anderson.*[108] In *Shaffer* the Court made it clear that "jurisdiction over a thing" is in fact shorthand for "jurisdiction over the interests of a person in a thing."[109] In *May,* the Court recognized that there are personal rights arising out of the parent-child relationship that are entitled to *International Shoe's* protection.[110] Equally important rights arise out of the marital relationship, and they are equally entitled to protection.[111]

Since each argument advanced to justify a court's granting a divorce when the requisite minimum contacts are lacking fails, only one

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judicate status issues).

[103] W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 74-76 (1923).

[104] *Id.* at 75.

[105] 175 Mass. 71 (1900).

[106] *Id.* at 76.

[107] 433 U.S. 186 (1977).

[108] 345 U.S. 528 (1953).

[109] 433 U.S. at 207.

[110] 345 U.S. at 534.

[111] Decisions allowing a court to take jurisdiction to dissolve a marriage in the absence of in personam jurisdiction appear to be oblivious to these rights. As Justice Jackson stated, "settled family relationships may be destroyed by a procedure that we would not recognize if the suit were one to collect a grocery bill." Williams v. North Carolina, 317 U.S. at 316 (Jackson, J., dissenting).

Justice Frankfurter, dissenting in *Vanderbilt,* could find no basis for distinguishing between property rights and the rights persons have in the marital relationship. He noted that "both situations involve the adjudication of valuable rights of an absent spouse." Vanderbilt v. Vanderbilt, 354 U.S. 416, 424 (1957). Anomalously, he concluded that full faith and credit should be extended to both divorce and alimony decrees, even in the absence of in personam jurisdiction. *Id.* at 425.

conclusion can be drawn: *International Shoe* standards must be applied to actions affecting marital status.[112] Judge Traynor, writing more than twenty years ago,[113] excellently summarized the argument for this position, stating:

> We are driven to question the reality of traditional jargon about in rem and in personam jurisdiction in these aggravated clinical cases where we deal with the fictional res of status. What could be more personal than the intimate marital or parental relationship? Whatever the historical explanation of their reification as a means of circumventing *Pennoyer v. Neff* while purporting to respect it, the time has come to slough off the ritualistic classifications through which judges still feel bound to think their hard way to realistic decisions.
>
> Why should they not be free to consider jurisdiction at the outset in the complex of the parties' contacts with forum states, the interests of the state concerned in the outcome, and a pervading concept of fair play to all parties?[114]

IV. Applying *International Shoe* To Divorce Actions: The Effect

As previously noted, the court in *In re Rinderknecht*[115] concluded that *Shaffer* mandated the application of *International Shoe's* minimum contacts requirement to divorce actions, but held that the domicile of a plaintiff spouse within the state was sufficient to meet that requirement.[116] The decision thus calls into question the level of contacts that are necessary to meet the standard of fairness essential for

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[112] *Accord,* Comment, *State Court Jurisdiction After Shaffer v. Heitner: The Lingering Problems,* 15 Willamette L. Rev. 281, 302 (1979) (*Shaffer* requires that *Williams I* be overruled).

It might be argued that divorce actions are exempted from *International Shoe's* criteria by footnote 30 of the Court's opinion in *Shaffer* which states, "We do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness." 433 U.S. at 208 n.30. This footnote, however, does not provide an exemption. Rather, it places such actions in a category with other in rem actions which the Court noted *might* not be affected by its holding. *Id.* at 207. Nor does the Court's footnote imply that actions affecting marital status will always meet the standard of fairness; it merely suggests that in some instances such actions may not be inconsistent with that standard.

[113] Traynor, *supra* note 38, at 661.

[114] *Id.* at 660 (footnotes omitted).

[115] 367 N.E.2d 1128 (Ind. Ct. App. 1977).

[116] *Id.* at 1134-35, *discussed at* notes 89 through 94 and accompanying text *supra.*

jurisdiction in a divorce action. Considered against this standard, the *Rinderknecht* opinion was incorrectly decided. This point is illustrated by the following hypothetical situation: After their marriage, a couple reside as husband and wife in Mississippi. Marital problems arise and one spouse moves to Nevada, establishes domicile by residing there for six weeks,[117] and files for divorce in a Nevada court. The other spouse has had no contacts whatsoever with Nevada.

In this situation, there are several reasons why the Nevada court cannot properly assert jurisdicion to grant the divorce. The defendant has taken no action which can be construed as purposely availing himself of the benefits and protection of Nevada's laws.[118] In fact, with respect to the marital relationship,[119] the only laws the defendant has sought protection under are the laws of Mississippi. *Kulko* establishes that the plaintiff's unilateral decision to move to Nevada is not sufficient to charge the defendant with contacts with the forum.[120]

The justification most often given for allowing a court to assert jurisdiction to grant a divorce when the defendant has no contacts with the forum state is the state's high interest in the marital status of its domiciliaries.[121] Even if it is assumed that Nevada could develop such

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[117] *See* NEV. REV. STAT. § 125.020 (1979) (six week residency requirement for divorce action).

[118] *See* Hanson v. Denckla, 357 U.S. at 253 (defendant must purposely avail himself of benefits and protection of laws of forum state). One commentator proposed that when a person enters a marriage with the knowledge that the other spouse might establish domicile in another state, that person impliedly avails himself of the benefits of the laws of the states in which the other spouse may subsequently become domiciled. Seidelson, *Interest Analysis and Divorce Actions*, 21 BUFFALO L. REV. 315, 321 (1972). The commentator admits, however, that this is not a satisfactory rationale, and proposes an alternative justification for imposing jurisdiction over the nonresident defendant. *Id.* He suggests that the state of the plaintiff's domicile be considered an appropriate forum if constructive service meeting due process requirements is made. *Id.* at 325. The commentator believes there is no basis for the restrictions imposed by *Hanson* and that courts should be able to decide cases in spite of them. *Id.* at 327-29. In essence, he advocates that, at least in this context, *Hanson* be overruled. That the Supreme Court is neither inclined to overrule *Hanson* nor to relax the restrictions upon state court jurisdiction is evident from Kulko v. California Super. Ct., 436 U.S. 84 (1978). *See* notes 53 through 59 and accompanying text *supra*.

[119] *See* Shaffer v. Heitner, 433 U.S. at 209 (consider relationship between forum and litigation).

[120] Kulko v. California Super. Ct., 436 U.S. at 93-94.

[121] *See, e.g.*, Williams v. North Carolina, 317 U.S. at 298-99 (state's interest in preventing polygamous marriages and protecting innocent children); *In re* Rinderknecht, 367 N.E.2d at 1135 (state's high interest made plaintiff's domicile sufficient contact); Traynor, *supra* note 38, at 661 (state's interest in orderly resolution of domiciliary's marital status).

an interest in the marital status of one who has resided in the state for only six weeks, this does not justify the court's asserting jurisdiction, since the Supreme Court explicitly stated in *Kulko* that a state's interest in the litigation is insufficient, standing alone, to meet the standard of fairness.[122]

Another consideration is the fairness to the defendant of allowing the Nevada court to consider the divorce action. Since it was the plaintiff who chose to leave the state of matrimonial domicile, it seems more fair to require that the plaintiff return to Mississippi to bring the action.[123] It has been argued that in instances where the marital relationship is only nominal, it is not fair to require the plaintiff spouse to leave his domiciliary state to obtain a divorce, since the defendant has no real interest in preserving the marriage.[124] Conceding that this is sometimes the case, there often will be instances when the defendant does wish to preserve the marital relationship. In these instances, the ex parte divorce works a hardship upon the defendant.[125]

V. Conclusion

The divisible divorce doctrine represents a last bastion of the *Pennoyer* system.[126] The demise of *Pennoyer* should be made complete by the overruling of *Williams v. North Carolina*[127] (*Williams I*) and the application of the minimum contacts standard to all aspects of divorce proceedings. When this standard is applied to divorce actions, the domicile of the plaintiff in the forum state should not be considered as a sufficient basis for the proper assertion of jurisdiction, but rather courts should examine the defendant's relationship to the forum state to see if it is sufficient to meet the standards of *International Shoe* and its progeny.

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[122] 436 U.S. at 98.

[123] *Cf.* note 59 and accompanying text *supra*.

[124] *See* Traynor, *supra* note 38, at 661 (defendant's purposeless interest outweighed by plaintiff's interest in freedom); Comment, *supra* note 112, at 303 n.111 (might be proper to assert jurisdiction where marriage is dead).

[125] In Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139 (2d Cir. 1930), Judge Learned Hand noted that jurisdictional questions often involve a practical weighing of the inconveniences involved. *Id.* at 141.

[126] Another legacy of the *Pennoyer* era, *Seider*-type jurisdiction, continued to be employed until the Supreme Court's decision in Rush v. Savchuk, 444 U.S. 320 (1980), *discussed at* notes 60 through 64 and accompanying text *supra*.

[127] 317 U.S. 287 (1942), *discussed at* notes 68 through 70 and accompanying text *supra*.

FOREIGN INVESTMENTS IN MISSISSIPPI: AN ARGUMENT FOR LENIENCY

The increase in foreign investment[1] in Mississippi[2] has caused a xenophobic response,[3] as indicated by a recent flurry of legislative proposals to restrict nonresident alien investors.[4] Less than .3% of land in Mississippi is owned by foreign investors.[5] Of the 84,846 acres of foreign-owned Mississippi land,[6] less than one-third of the land is in the Mississippi Delta.[7] Despite the small percentage of foreign ownership in the state, an understanding of the ramifications of foreign invest-

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[1] Foreign investors spent $11.53 billion in the United States in 1979. Of that total, $1.48 billion was spent on real estate. Wall St. J., Feb. 3, 1981, at 17, col. 4. For the purposes of this article, the term foreign investment refers to real estate purchases, especially of agricultural land. Conversely, the term foreign direct investment is defined as the control of the operation of an American company by a foreign entity. The control occurs through ownership of corporate stock, creation of an American subsidiary, or through a joint venture. Note, *An Evaluation of the Need for Further Statutory Controls on Foreign Direct Investment in the United States*, 8 VAND. J. TRANSNAT'L L. 145, 145 (1974).

[2] Foreign purchasers acquired 12,165 acres of agricultural land in Mississippi between February 2, 1979 and February 1, 1980. The estimated value of this land was $14,726,000. ECONOMICS AND STATISTICS SERVICE, U.S. DEP'T OF AGRICULTURE, BULL. No. 440, FOREIGN OWNERSHIP OF U.S. AGRICULTURAL LAND 21 (1980).

[3] Xenophobia is defined as an unreasonable fear of foreigners. N. WEBSTER, NEW WORLD DICTIONARY 1644 (2d ed. 1970). Xenophobic reaction by a state is not a new phenomenon. *See* Sullivan, *Alien Land Laws: A Reevaluation*, 36 TEMP. L.Q. 15, 30-32 (1962) (prior state laws curtailing alien land ownership).

[4] H.B. 58, 59, 60, 61, 62 & 106, 1980 Miss. Leg., Reg. Sess.; H.B. 529 & 531, 1981 Miss. Leg., Reg. Sess. *See* notes 48 through 52 and accompanying text *infra*.

[5] BULL. No. 440, *supra* note 2, at 5. Mississippi has a total area of 30,269,000 acres, of which 26,629,000 acres are privately owned agricultural land. Of the latter total, 84,846 acres are foreign-owned. Eighteen states, including Tennessee, Alabama, Georgia, and Florida, rank above Mississippi in percentage of foreign-owned agricultural land. *Id.* There are 20,780 acres of foreign-owned forest and nonagricultural holdings in Mississippi. *Id.* at 16.

[6] *Id.* at 5.

[7] Delta Democrat Times (Greenville, Miss.), Feb. 16, 1981, at 1, col. 1-2. The Greenville newspaper reported that 23,400 acres of mid-Delta farmland are held by foreign investors who lease most of the land back to Mississippi farmers. The investor improves the land, and it goes back to the local farmer in better condition than it was in before the purchase. The chief investors are Europeans interested in woodland. *Id.* Between Feb. 2, 1979 and Feb. 1, 1980, 594 acres of forest and nonagricultural land were purchased in Mississippi by foreigners. The estimated value of this land was $397,000. BULL. No. 440, *supra* note 2, at 30.

ment in light of the present Mississippi law[8] is needed in order to establish a cohesive state policy toward foreign investors.

Land, especially farm land, has sociological and political aspects[9] which make foreign acquisition of real estate a particularly sensitive topic.[10] Regulation of property ownership traditionally has been left with the states.[11] However, any state statute regarding alien investment is subject to constitutional scrutiny[12] as well as to treaty preemption.[13] This article examines the present trend in foreign investment and the state of the law relating to alien investors with emphasis on Mississippi law regarding alien ownership of land.

I. The Increase in Foreign Investment

A. Reasons for the Increase

As a new nation, the United States welcomed foreign capital to develop industry.[14] As the country grew economically, however, America became an exporter of capital and established its international presence through large multinational corporations.[15] Recently, state governments, as well as the federal government, have encouraged a resurgence of foreign investment within their borders.[16]

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[8] *See* Miss. Code Ann. § 89-1-23 (1972) (rights of resident and nonresident aliens holding land); *id.* § 29-1-75 (nonresident alien prohibited from purchasing public land); *id.* § 11-39-1 (quo warranto proceeding for illegal holding of land by nonresident alien); notes 183 through 218 and accompanying text *infra*.

[9] *See* Gaffney, *Social and Economic Impacts of Foreign Investment in United States Land*, 17 Nat. Resources J. 377, 385 (1977) (landowners are political caste who provide needed social and public leadership); Morrison, *Limitations on Alien Investment in American Real Estate*, 60 Minn. L. Rev. 621, 621 (1976) (acquisition of frontier land played important historical role in advancement of democracy in United States).

[10] *See, e.g.*, *The Foreign Land-Grab Scare*, Time, Jan. 8, 1979, at 40 (reports of "carpetbagging" foreigners buying United States farmland upsetting to American farmers).

[11] Hauenstein v. Lynham, 100 U.S. 483, 484 (1880).

[12] *See* notes 78 through 134 and accompanying text *infra*.

[13] *See* notes 152 through 173 and accompanying text *infra*.

[14] Note, *State Regulation of Foreign Investment*, 9 Cornell Int'l L.J. 82, 82 (1975).

[15] *Id.* American companies with national sales plans and unique products were the first to be successful abroad. Companies such as Singer, Standard Oil, General Electric, and National Cash Register were the first international businesses. M. Wilkins, The Emergence of Multinational Enterprise 37, 39 (1970). By the end of the 1920's, American investments abroad were triple those of foreign investors in the United States. E. Kirkland, A History of American Economic Life 648 (3d ed. 1951).

[16] Several states have established offices abroad to lure foreign capital. For example, Georgia, South Carolina, Virginia, Michigan, and New York have representatives in

The present American interest in foreign monies may be explained partially by the weakening dollar. As the dollar has declined in value, holders of stronger currencies such as the Japanese yen,[17] the German mark, and the Swiss franc have been able to purchase American land at bargain prices.[18] Despite the dollar slump, the United States economy is viewed favorably by foreigners who believe inflation will be controlled better here than in other countries.[19] Since United States real estate is plentifully available, improved properties in prime locations may be purchased at lower costs than similar properties offered in other countries.[20]

Another factor enhancing foreign investment in the United States involves the increased monetary reserves of OPEC countries. The reserves have stimulated investment by those seeking advantageous means to develop their wealth.[21] Also, United States tax laws give for-

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Brussels and Tokyo. Texas maintains offices in Mexico, Tokyo, and London. Alabama and North Carolina are headquartered in Switzerland. Maine and Wisconsin have located offices in Frankfurt. THE CONFERENCE BOARD, REP. No. 625, FOREIGN INVESTMENT IN THE UNITED STATES: POLICY, PROBLEMS AND OBSTACLES 33-34 (1974).

The Nixon and Ford administrations maintained a pro-foreign investment policy. Note, *Foreign Direct Investment in United States Real Estate: Xenophobic or Principled Reaction?*, 28 U. FLA. L. REV. 491, 496 (1976). The Carter administration's policy was to remain neutral regarding foreign purchases of farmland. 19 HARV. INT'L L.J. 1026, 1030 (1978).

[17] Japanese acquisition of property centers on corporate investment and urban real estate, rather than on agricultural land. As of February 1, 1979, Japanese investors held only 3,711 acres of agricultural land in America. BULL. No. 440, *supra* note 2, at 11. Japanese investments have grown extensively in the past decade. *See* Wall St. J., Jan. 20, 1975, at 6, col. 2 (Japanese announce investments in 45 United States plants); *id.*, Oct. 29, 1975, at 4, col. 2 (Japanese some of largest holders of United States corporate securities); *id.*, Mar. 10, 1981, at 38, col. 6 (major Japanese investment in Tennessee).

[18] ECONOMICS, STATISTICS, & COOPERATIVES SERVICE, U.S. DEP'T OF AGRICULTURE, REPORT TO THE CONGRESS, MONITORING FOREIGN OWNERSHIP OF U.S. REAL ESTATE 3 (1980) [hereinafter cited as MONITORING].

[19] Roulac, *Advising Foreign Investors in U.S. Real Estate*, 9 REAL EST. L.J. 108, 111 (1980).

[20] *Id.* Services in the United States that evaluate, manage, finance, and develop real estate make the market appealing to foreign investors. Further, foreigners find the availability of nonrecourse financing appealing. *Id.* at 112.

The difference availability makes in land prices is illustrated in this example: In 1974, in downtown Los Angeles, property sold for $50 a square foot, while similar land in Tokyo cost $900 a square foot. Wall St. J., Mar. 5, 1974, at 1, col. 6.

[21] 12 CASE W. RES. J. INT'L L. 231, 233 (1980). In the usual case, OPEC countries have not invested in American real estate. There primary interest centers on purchase of corporate securities. These have been, however, isolated purchases of real estate. For example, Kuwait invested $10 million in an Atlanta mall-hotel and also purchased Kiwah Island, 15 miles north of Charleston, South Carolina. Iran bought 642 Fifth Ave-

eigners favorable treatment.[22] Although Congress recently enacted legislation that taxes foreign investors' gains or losses from the disposition of certain properties,[23] this legislation is not likely to curtail foreigners, since its impact may be minimized by proper investment guidance.

In addition to economic benefits, the United States' democratic government presents political stability and freedom from government controls. Purchasers value the increased probabilities that their investments will not be subject to political unrest or acts of terrorism.[24] Additional incentives for foreign investors are provided by an efficient labor force and the leadership of the United States in marketing and management.[25]

B. American Fears

Except for Maine,[26] foreign acquisitions are concentrated in the South, with thirty percent of the foreign-owned agricultural land located in Alabama, Florida, Georgia, North Carolina, South Carolina, Tennessee, and Texas.[27] The United Kingdom, Luxembourg, Canada,

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nue, in New York City. N.Y. Times, Sept. 7, 1974, at 1, col. 6.

[22] The investment of a nonresident alien individual or a foreign corporation is not subject to taxation when the investment is not effectively connected with the conduct of a trade or business within the United States by such individual or corporation. I.R.C. §§ 871(b), 882(a). See, however, note 23, *infra*, for recent legislation that modifies this exemption.

[23] Foreign Investment in Real Property Tax Act of 1980, Pub.L. No. 96-499, § 1122, 94 Stat. 2682-87 (codified at I.R.C. § 897). This Act provides that gain or loss from the disposition of a "United States real property interest" shall be taxed under I.R.C. §§ 871(b)(1) or 82(a)(1) as if the nonresident alien individual or foreign corporation were engaged in a trade or business within the United States and the "property interest" were effectively connected with such trade or business. A "United States real property interest" is an interest in real property located in the United States or an interest (other than an interest solely as a creditor) in certain domestic corporations that own an interest in real property located in the United States. These provisions of this Act are effective for dispositions after June 18, 1980.

[24] *See The Selling of America*, TIME, May 29, 1978, at 70 (United States offers foreign investors economic and political stability); MONITORING, *supra* note 18, at 3 (foreign investors feel United States real estate investment provides protection from political and economic problems at home).

[25] 12 CASE W. RES. J. INT'L L., *supra* note 22, at 232-33; Roulac, *supra* note 19, at 112.

[26] Approximately five percent of the total acreage in Maine is foreign-owned. One timber firm, however, holds approximately 80% of this total. BULL. No. 440, *supra* note 2, at 6.

[27] *Id.* at 5. The 1,717,006 acres of foreign holdings in the South are divided as follows: Alabama, 163,498; Florida, 202,101; Georgia, 257,309; North Carolina, 152,096; South Carolina, 240,437; Tennessee, 287,855; and Texas, 413,710. *Id.* As of February 1,

West Germany, the Netherlands, and the Netherlands Antilles lead as the major investors in United States agricultural land, accounting for eighty-one percent of the investments.[28] Although more individuals are reported owners of the land, foreign corporations own larger acreages.[29]

Foreign farmland purchases have raised concerns over economic consequences and use of the land,[30] but the fear that land prices will rise due to foreign investment seems in large part unjustified.[31] For instance, Georgia and Tennessee have very high rates of foreign investment, but the increases in land prices in those states since 1973 have been average or below-average.[32] Because the real estate market is relatively unrestricted, foreign purchasers have little reason to pay high prices[33] unless they are seeking a particular type, location, or quality of land.[34]

1980, total foreign ownership of United States agricultural land was 5.6 million acres, or slightly less than 0.5%. *Id.* at 1.

The preference for agricultural land, rather than urban real estate, may be explained by a growing sensitivity to worldwide food shortages. F. MORRISON & K. KRAUSE, STATE AND FEDERAL LEGAL REGULATION OF ALIEN AND CORPORATE LAND OWNERSHIP AND FARM OPERATION 23 (U.S. DEPT. OF AGRICULTURE, AGRICULTURAL ECONOMIC REPORT No. 284 (1975)).

[28] BULL. No. 440, *supra* note 2, at iii. Forest land holdings represent 50% of foreign-owned agricultural land, while cropland, pasture, and other agricultural land represent 45% of foreign-owned holdings. A small percentage of foreign-owned agricultural land is comprised of orchards and vineyards. *Id.* at 13.

[29] ECONOMICS, STATISTICS AND COOPERATIVES SERVICE, U.S. DEP'T OF AGRICULTURE, REP. No. 447, FOREIGN OWNERSHIP OF U.S. AGRICULTURAL LAND 5 (1980). Some 1,215 individuals were reported owning 216,532 acres of land, an average of 178 acres per holder; 544 foreign corporations were reported owning some 2,346,696 acres, an average of 4,314 acres per holder. *Id.*

[30] *Id.* at 24-26. Increase in land prices, reduction in farming opportunities, and reduction in local markets are some of the fears raised by foreign ownership of American farmland. *Id.* The average price paid for agricultural land by a foreigner, however, is $610 per acre,while the national average value of farmland is $559 per acre. *Id.* at 25 n.13.

[31] *See generally* Roulac, *supra* note 19, at 113-14 (foreign real estate investments contribute to but do not establish higher United States land prices); White, *How Foreign Money Buys U.S. Real Estate*, 47 APPRAISAL J. 59, 60 (1979) (same).

[32] REP. No. 447, *supra* note 29, at 24. Kentucky, Wisconsin, and Minnesota, however, have experienced above-average increases in land prices, although the rate of foreign buying was low. *Id.*

[33] Foreign investors pay higher prices because prime real estate costs more, not because they are not discriminating buyers. Roulac, *supra* note 19, at 114. *Contra*, Zagaris, *The Agricultural Foreign Investment Disclosure Act of 1978: How Will It Affect the Market in U.S. Real Estate?*, 8 REAL EST. L.J. 3, 12 (1979) (foreign investors pay excessive prices for land, resulting in inflated prices).

[34] MONITORING, *supra* note 18, at 22.

The long-term effects of foreign land investment on income and employment vary according to whether such transactions cause increases in domestic consumption, domestic investment, savings, and imports.[35] If the money from the sale of land developed by the foreign investor[36] is put into savings or is used to import goods, the effect on income and employment is minimal.[37] However, use of the proceeds for domestic consumption leads to a short-term stimulus of the economy.[38] Alternatively, if the proceeds are used for the creation of new capital goods or development of new real estate by the foreign investor, income and employment will be permanently increased unless the new investment displaces other domestic investments.[39]

Statistics regarding use of land by foreign investors indicate that very little agricultural land has been converted to non-agricultural uses.[40] In fact, in most cases foreign owners leave not only the land, but also the operators, the same as before the purchase.[41] Moreover, concerns that American farm production suffers as a result of absentee ownership seem unfounded, since foreign investors tend to increase rather than decrease agricultural production.[42] This increase cannot be attributed to consolidations because few foreign investors consolidate small farms into larger farms.[43]

Americans also worry that communities will suffer from the tenured operation of farmland.[44] This fear is unfounded since nearly forty percent of United States farmland is leased, and almost ninety percent of that is in the hands of non-operating owners.[45] In fact, absentee landowners actually generate net income for rural counties because the foreign investor pays property taxes but does not demand county ser-

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[35] *Id.*

[36] Examples of development by the foreign purchaser include construction of office buildings and shopping centers. *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* Domestic displacement may occur in areas of high employment. In such areas,foreign investments are likely to displace domestic investments by outbidding for scarce labor and resources. The end result would likely be higher prices rather than true income gains. *Id.*

[40] BULL. No. 440, *supra* note 2, at 117. As of February 2, 1979, 88% of agricultural lands that were foreign-owned remained agricultural lands. *Id.*

[41] *Id.*

[42] REP. No. 447, *supra* note 29, at 26.

[43] MONITORING, *supra* note 18, at 21; REP. No. 447, *supra* note 29, at 28. Some large foreign-owned farms do exist. Sullivan, *supra* note 3, at 36. The overwhelming majority of large corporate farms, however, are American-owned. *Id.*

[44] REP. No. 447, *supra* note 29, at 24.

[45] *Id.* at 29.

vices such as schools and welfare.[46]

C. *The Rise of State Regulatory Legislation*

State statutes regulating alien ownership of land were enacted long before the present trend of foreign investment.[47] The revitalized interest in American land, however, has prompted the introduction of state bills to curtail further foreign involvement. Recent Mississippi bills calling for strict definitions of foreign investors,[48] annual reporting of lease interests,[49] acreage restrictions,[50] corporate ownership limitations,[51] and a reduced time period for holding a lien[52] died in committee. The present Mississippi law on alien ownership totally restricts nonresident aliens, with the exception of Syrians and Lebanese, from holding land.[53] Despite this statutory prohibition, 84,846 acres of Mississippi agricultural land are owned by various foreign entities,[54] a phenomenon that, in many instances, may be explained by United States treaty considerations.[55]

An understanding of the Mississippi statute and its limitations can best be approached by comparing it with other state statutes and the history of their enactments. The various state statutes restricting alien land holdings have their origins in the adoption of English common law, which is the source of most American land law,[56] the late nine-

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[46] *Id.*

[47] *See* notes 71 through 75 and accompanying text *infra*. For an excellent history of alien land laws, see Sullivan, *supra* note 3, at 26-34.

[48] H.R. 529, 1981 Miss. Leg., Reg. Sess. The bill was labeled the "Foreign Investment Limitation Act of 1981" and proposed certain definitions for "foreign person" and "foreign official institution," neither of whom could own land in Mississippi. This bill was the same as H.R. 59, 1980 Miss. Leg., Reg. Sess.

[49] H.R. 531, 1981 Miss. Leg., Reg. Sess. This bill was the same as H.R. 62, 1980 Miss. Leg., Reg. Sess. Another bill, H.R. 61, 1980 Miss. Leg., Reg. Sess., proposed annual reporting by corporations and partnerships.

[50] H.R. 58, 1980 Miss. Leg., Reg. Sess. The authors of the bill sought to restrict foreign interest in land to 640 acres. *Id.*

[51] H.R. 58 & 60, 1980 Miss. Leg., Reg. Sess. The former bill called for at least 50% American ownership of the outstanding stock in any corporation. The latter proposed that 60% of such stock be American-owned. *Id.*

[52] H.R. 106, 1980 Miss. Leg., Reg. Sess. The bill proposed a deletion of the Syrian and Lebanese exemption as well as a monitoring system to ensure that nonresident aliens did not hold liens for more than three years. *Id.*

[53] Miss. Code Ann. § 89-1-23 (1972); *see* notes 183 through 190 and accompanying text *infra*.

[54] *See* note 5 *supra*.

[55] *See* notes 156 through 162 and accompanying text *infra*.

[56] Allen & Olaussen, *Problem Areas Concerning Foreign Investment in U.S. Real*

teenth century legislation in the midwest, and the anti-Japanese legislation during the early 1900's and the 1940's.[57] Under the English feudal land tenure system, foreigners were not viewed as loyal subjects of the king and his nobles and thus were excluded from direct land ownership.[58] Although England later lifted this ban against foreign property ownership,[59] the common law notions had already become a part of the British colonies. Some post-Revolution legislation removed the ownership restrictions, but most of the common law prohibitions remained.[60]

The movement of immigrant farmers into the midwestern states in the late 1800's caused the creation of more statutory restrictions on property ownership.[61] Only immigrants who intended to become United States citizens were allowed to own land.[62] As with the pre-Revolution law, the legislation remained after the reason for the initial enactment had ceased to exist.[63]

In an effort to eliminate alien competition, anti-Japanese legislation appeared on the west coast in the early part of the twentieth century.[64] California instituted a citizenship requirement based upon the Naturalization Act of 1913, which barred Oriental persons from naturalization.[65] After California's statute was declared constitutional in 1923,[66] other states based restrictions upon an alien's ineligibility for

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Estate, 2 NW. J. INT'L L. BUS. 1, 1-3 (1980); Fisch, *State Regulation of Alien Land Ownership*, 43 MO. L. REV. 407, 408-09 (1978); Morrison, *supra* note 9, at 623.

[57] *See* Sullivan, *supra* note 3, at 29.

[58] 2 W. BLACKSTONE, COMMENTARIES *248-49.

[59] The prohibition was removed by statute. Naturalization Act, 1870, 33 & 34 Vict. c. 14, § 2.

[60] Ohio was the first state to remove completely the alien landholding restriction. 1804 OHIO LAWS 123. Sullivan notes that "actual removal of disabilities became less imperative once the capacity to remove them at will had been won. When the need seemed pressing, liberal policies were followed but where it did not the common law disabilities were retained or replaced by comparable legislation restrictions." Sullivan, *supra* note 3, at 29.

[61] Sullivan, *supra* note 3, at 30-32.

[62] Morrison, *supra* note 9, at 625. This legislation was passed in response to large purchases of land in the Western territories by British nobles. The residents feared that large purchases by foreigners would endanger the ultimate grant of statehood and create economic dependence on England. *Id.*

[63] The significance of these laws was reduced because the territories were organized into states; British interference and control, the reason behind the statutes' enactment, simply did not develop. The legislation, however, remained. *Id.*

[64] *Id.* at 626-28.

[65] *Id.* at 626.

[66] *See* Porterfield v. Webb, 263 U.S. 225, 228 (1923) (statutory discrimination against aliens based on reasonable classification).

citizenship.[67] New anti-Japanese legislation appeared during World War II,[68] but most of these racially discriminatory statutes were repealed after the war.[69] In 1952, an amendment to the Federal Immigration Law eliminated the class of "ineligible alien" from immigration laws[70] and thus, state laws based upon ineligibility of United States citizenship became meaningless.

The different origins of state legislation against aliens led to four broad categories of state statutes. These categories are: (1) statutes which are based upon the common law general prohibition;[71] (2) statutes which limit the amount and period of ownership;[72] (3) statutes

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[67] Sullivan, *supra* note 3, at 34. Arizona, Delaware, Idaho, Kansas, Montana, Oregon, and Texas adopted similar statutes within five years of the California decision. Louisiana and New Mexico incorporated alien restrictions into their constitutions. *Id.* It is interesting to note that the xenophobia had spread to states that had practically no Japanese population. *Id.; see* KAN. STAT. § 59-511 (1939) (citizenship land ownership requirement).

[68] Sullivan, *supra* note 3, at 34. During this period, Arkansas, Utah, and Wyoming joined the ranks of states with restrictive alien laws. *Id.*

[69] *Id.* at 32-34; Morrison, *supra* note 9, at 627-28. For a specific study, see Note, *Are Oklahoma's Restrictions on Alien Ownership of Land Constitutional?*, 32 OKLA. L. REV. 144 (1979).

Any racially restrictive land laws still in existence probably would be unconstitutional. *See* Oyama v. California, 332 U.S. 633, 647 (1948) (native-born citizen of Oriental descent not subject to alien land statute). The majority in *Oyama* did not reach the question whether the restrictive alien land statute denied equal protection. *Id.* Four justices, however, in concurring opinions, questioned the constitutionality of the statute. *Id.* at 647-74; *see* notes 85, 86 and accompanying text *infra.*

[70] Immigration and Nationality Act, Pub. L. No. 82-414, § 311, 66 Stat. 239 (1952) (codified at 8 U.S.C. § 1422 (1976)). The only remaining classes of aliens ineligible for citizenship are based on national defense: (1) Those favoring a totalitarian government; (2) deserters of the armed forces; and (3) persons dismissed from armed services due to alienage. 8 U.S.C. §§ 1424-1426 (1976).

[71] Eight states allow only resident aliens to own property: CONN. GEN. STAT. ANN. § 47-57 (1958); IOWA CODE ANN. § 567.3 (Supp. 1981-82); MISS. CODE ANN. § 89-1-23 (1972); N.H. REV. STAT. ANN. § 477:20 (1968); N.J. STAT. ANN. § 46:3-18 (West Supp. 1979); OKLA. STAT. ANN. tit. 60, §§ 121-22 (1970). Alaska and Hawaii retained the federal alien land law that was in effect when statehood was granted. *See* 48 U.S.C. § 1502 (1976) (resident alien may own land). Alaska has not imposed further restrictions. Hawaii has, in addition to the incorporated federal law, restricted ownership of residental lots on Oahu to United States citizens or declarant aliens residing in the state for five years or more. HAW. REV. STAT. § 206-9 (1976); *id.* § 516-33 (Supp. 1979).

[72] *See* ILL. REV. STAT. ch. 6, §§ 1-2 (Smith-Hurd Supp. 1978) (alien's right to hold realty limited to six years or until alien reaches majority); IND. CODE ANN. § 32-1-8-1 (Burns 1979) (alien may not hold over 320 acres longer than five years or for five years past age 18); KY. REV. STAT. ANN. §§ 381.300-.320 (Baldwin 1979) (nonresident alien may hold eight years, while resident alien may hold 21 years); MO. ANN. STAT. § 442.560 (Vernon Supp. 1980) (nonresident alien may own no more than five acres of agricultural

which restrict ownership of land to aliens eligible for citizenship;[73] and (4) statutes which offer aliens full national treatment.[74] Restrictions on an alien's ability to inherit American land may also affect alien acquisition of land.[75]

These inconsistent state laws confuse American policymakers and alien investors alike and inhibit a cohesive foreign relations policy.[76] In addition, the lack of uniformity in land laws traps the uninformed alien and forces the financially powerful alien to disguise purchases by the use of corporations or trusts.[77] Furthermore, the statutes are subject to constitutional scrutiny and federal preemption.

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land); NEB. REV. STAT. § 76-402 (1976) (aliens may hold five years); OKLA. STAT. ANN. tit. 60, § 123 (1970) (nonresident alien may hold for only five years); PA. STAT. ANN. tit. 68, § 32 (Purdon 1965) (alien may hold only 5,000 acres); S.C. CODE § 27-13-30 (1976) (alien may not hold more than 500,000 acres) (see note 238 *infra* for the history of this provision); S.D. COMP. LAWS ANN. §§ 43-2-9, 43-2A-1, -2, -7 (Supp. 1979) (nonresident alien may not hold more than 160 acres except that acquired by devise, inheritance, or kept as debt security); WIS. STAT. ANN. §§ 710.01, .02 (West 1977) (nonresident alien may own only 640 acres).

[73] ARIZ. REV. STAT. ANN. § 33-1201 (1956); KAN. STAT. ANN. § 59-511 (1963); MINN. STAT. § 500.221(2) (Supp. 1980); OR. REV. STAT. § 517.044 (1977); WYO. STAT. § 34-15-101 (1977). Colorado and Louisiana enacted constitutional restrictions. COLO. CONST. art. II, § 27; LA. CONST. art. 19, § 20.

[74] Several states give aliens the right to hold real property on equal terms with citizens of the United States. *See, e.g.*, ALA. CODE § 35-1-1 (1975); ARK. STAT. ANN. § 50-301 (1971); TENN. CODE ANN. § 64-201 (1976). For a discussion and more complete list of states with similar statutes, see Sullivan, *supra* note 3, at 17.

Three other states allow ownership by alien subjects of governments friendly with the United States. GA. CODE ANN. § 79-303 (1973); MD. REAL PROP. CODE ANN. § 14-101 (1974); VA. CODE § 55-1 (1950).

[75] Morrison, *supra* note 9, at 637-38. In many eastern European countries during the Cold War, inheritances were virtually confiscated. Consequently, American states with large populations of first-generation immigrants from these countries passed statutes prohibiting distribution of an inheritance to a nonresident alien, absent proof that the inheritance would not be confiscated. *Id.*; *see e.g.*, N.Y. SURR. CT. PROC. ACT § 2218(3) (McKinney Supp. 1980).

As a further restriction on inheritance of land by aliens, some states require reciprocal inheritance rights. Thus, a United States citizen must be able to inherit land in the alien's country in order for the alien to inherit in the United States. *E.g.*, NEB. REV. STAT. § 4-107 (1977); WYO. STAT. § 34-15-101 (1977).

[76] *See* notes 174 through 186 and accompanying text *infra*.

[77] *See* notes 231 through 243 and accompanying text *infra*.

II. Challenges to Regulation of Alien Ownership of Land

A. Equal Protection Arguments

The fourteenth amendment mandates that no state may deny "any person within its jurisdiction the equal protection of the law."[78] Resident aliens have long been viewed as "persons" under the equal protection clause.[79] However, nonresident aliens have not been deemed to be a "discrete and insular" minority,[80] although alienage has been classified as a suspect category.[81]

Initially, resident aliens enjoyed the same rights and privileges as American citizens.[82] As the United States industrialized, however, attitudes toward aliens changed,[83] and the equal protection clause had to be used to strike down state legislation that restricted the employment opportunities of resident aliens.[84] Yet, it was not until the 1948 decision of *Takahashi v. Fish & Game Commission*[85] that the Court held that state power in restricting aliens was confined to narrow circumstances.[86]

In the 1971 case of *Graham v. Richardson*,[87] denial of welfare ben-

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[78] U.S. Const. amend. XIV, § 1.

[79] *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (fourteenth amendment applies to all persons without regard to nationality).

[80] *See* Sugarman v. Dougall, 413 U.S. 634, 641 (1973) (protection extended to aliens working in United States); Johnson v. Eisentrager, 339 U.S. 763, 771 (1950) (protection requires lawful presence).

The concept of a "discrete and insular" class was first mentioned in United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). Justice Stone advanced the proposition that groups lacking effective political power could be afforded a higher standard of review. *Id.*

[81] *In re* Griffiths, 413 U.S. 717, 721 (1973); Sugarman v. Dougall, 413 U.S. 634, 642 (1973); Graham v. Richardson, 403 U.S. 365, 372 (1971).

[82] Comment, *Equal Protection and Supremacy Clause Limitations on State Legislation Restricting Aliens*, 1970 Utah L. Rev. 136, 136.

[83] *Id.*; Note, *Equal Protection Review of State Statutes Restricting Alien Employment*, 8 Cornell Int'l L.J. 92, 92 (1974). The resident alien worker was greeted with open arms so long as there was enough work for citizen and alien alike. As America changed into an urbanized industrial society, however, the states adopted a more restrictive attitude toward the now undesirable alien workers. Thus, statutes were passed severely limiting jobs available to aliens. *Id.*

[84] *See* Truax v. Raich, 239 U.S. 33, 43 (1915) (Arizona anti-alien labor law unconstitutional); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (laundry permit statute applied only to aliens unconstitutional).

[85] 334 U.S. 410 (1948).

[86] *Id.* at 420. The Court invalidated a California statute which prohibited aliens from obtaining a fishing license and thereby deprived them from earning a living. *Id.*

[87] 403 U.S. 365 (1971).

efits to resident aliens was held to be unconstitutional.[88] Resident aliens are now considered a discrete and insular minority and thus "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."[89] The protection is justified in light of the fact that aliens in the United States must pay income taxes[90] and must subject themselves to the laws of the United States.[91] This constitutional protection has been extended only "to aliens who 'work for a living in the common occupations of the community.' "[92] Therefore, nonresident aliens do not benefit from these cases.

A subclass of aliens, those ineligible for citizenship, has also raised equal protection arguments in the area of land ownership. Several cases were decided in 1923 by the United States Supreme Court, which upheld state statutes prohibiting aliens who were ineligible for citizenship from owning land.[93] In 1948, the Court reversed itself in *Oyama v. California*[94] and held that a landowning restriction against ineligible aliens was unconstitutional.[95]

The present equal protection doctrine provides two degrees of constitutional protection. To be constitutional, a law that affects suspect classifications or fundamental rights must meet the "higher test" of a compelling state interest.[96] In cases involving a resident alien's occupation or economic rights, courts have used strict scrutiny to declare various state laws unconstitutional.[97] Other classifications need only com-

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[88] *Id.* at 374.

[89] *Id.* at 372.

[90] I.R.C. § 871(b). *See* Treas. Reg. § 1.1-1(a) (taxation of aliens).

[91] Eisler v. United States, 170 F.2d 273, 279 (D.C. Cir. 1948).

[92] Truax v. Raich, 293 U.S. 33, 44 (1915), *quoted in* Sugarman v. Dougall, 413 U.S. 634, 641 (1973).

[93] *See* Frick v. Webb, 263 U.S. 326, 333-34 (1923) (statute prohibiting alien ownership of stock in a farm corporation upheld); Webb v. O'Brien, 263 U.S. 313, 321 (1923) (citizen could not enter contract with an alien ineligible for citizenship); Porterfield v. Webb, 263 U.S. 225, 232 (1923) (law forbidding aliens not eligible for citizenship to lease land constitutional); Terrace v. Thompson, 263 U.S. 197, 222 (1923) (statute prohibiting nondeclarant aliens' ownership of land upheld).

[94] 332 U.S. 633 (1948).

[95] *Id.* at 647.

[96] Hunter v. Erickson, 393 U.S. 385, 391-92 (1969); Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

[97] Nyquist v. Mauclet, 432 U.S. 1, 12 (1977) (denial of state educational financial aid to nondeclarant alien unconstitutional); Examining Bd. v. Flores de Otero, 426 U.S. 572, 601 (1976) (denial of license to practice civil engineering to alien unconstitutional); Indiana Real Estate Comm'n v. Satoskar, 417 U.S. 938, 938 (1974) (district court holding invalidating statute denying real estate licenses to aliens *aff'd mem.*) (district court deci-

ply with the "lower test" of a rational relationship between the classification and its intended purpose.[98] However, before a standard of review may be applied, it is first necessary to determine whether the alien is in the class of persons entitled to present an equal protection claim.

Nonresident aliens have not been extended the guarantees of equal protection because they are not physically present within the state and, therefore, are not within the state's jurisdiction.[99] However, by the mere implementation of the statute's restriction, the alien is subject to the state's jurisdiction.[100] In addition, a nonresident alien with a tourist visa may make a personal appearance before an adjudicatory tribunal and thus subject himself to the state's jurisdiction.[101]

Investment motives lead to further confusion between the alienage distinctions. A resident alien's ownership of land receives equal protection status since it is viewed as a fundamental right.[102] On the other hand, a nonresident alien's interest in United States land is seen purely as an investment rather than as a source of economic survival.[103] Many states have recognized this distinction and have exempted resident aliens from the statutes' land ownership restrictions.[104] However, since the language of a statutory exemption is often broad, a resident

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sion unpublished, and 7th Circuit did not hear the case); *In re* Griffiths, 413 U.S. 717, 722 (1973) (exclusion of aliens from practice of law unconstitutional); Graham v. Richardson, 403 U.S. 365, 376 (1971) (denial of welfare benefits to aliens unconstitutional).

[98] *E.g.*, Dandridge v. Williams, 397 U.S. 471, 485 (1970) (reasonable basis); McGowan v. Maryland, 366 U.S. 420, 426 (1961) (reasonable justification); Lindsley v. National Carbolic Gas Co., 220 U.S. 61, 78 (1911) (reasonable classification).

[99] *See* Shames v. Nebraska, 323 F. Supp. 1321, 1333 (D. Neb. 1971) (nonresident alien not physically present in state).

U.S. CONST. amend. XIV, § 1 provides in part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The United States Supreme Court has not yet given a precise meaning to "any person within its jurisdiction." The term "within its jurisdiction" was first viewed as physical presence within the state's borders. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). Later, the term was construed to mean within the jurisdiction of the state's courts. Blake v. McClung, 172 U.S. 239, 261 (1898). Most recently, the *Blake* standard was modified to include one appearing before a state's courts. Kentucky Fin. Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544, 549 (1923).

[100] *See* Graham v. Richardson, 403 U.S. 365, 371 (1971) (statutory creation of two classes invokes equal protection analysis).

[101] Morrison, *supra* note 9, at 642.

[102] *Id.* Land ownership is basic to economic survival; therefore, strict scrutiny should be applied to defeat state restrictions on alien land ownership. *Id.*

[103] *Id.* at 643. *See* notes 110, 111 and accompanying text *infra*.

[104] *See* note 73 and accompanying text *supra*.

alien may also purchase property to extend his investments. Therefore, a resident alien may receive equal protection for an investment which is not an economic necessity, while a nonresident foreign investor who wishes to expand financially receives no protection for his American property. At least one commentator argues for recognition of nonresident alienage as a suspect category if the nonresident has property rights in the United States or is physically present within the jurisdiction.[105]

One argument against the extension of constitutional protection to the foreign investor incorporates the over inclusive rationale that ninety percent of the world's population cannot be viewed as a suspect category.[106] Realistic property considerations indicate the fallacy of this argument. The small percentage of foreigners having property rights or being actually present with a state's jurisdiction should be offered a fundamentally fair method of property protection.[107] Both resident and nonresident aliens owning land in the United States pay property taxes.[108] In spite of this, the nonresident alien may have his property taken away and be left with no recourse in American courts.

Despite the irrational gaps in the treatment of alienage, the nonresident alien would probably not meet the suspect classification or fundamental right requirements needed for strict judicial review. Although the nonresident alien is part of a minority group, he may not be viewed as an "isolated minority" needing special judicial protection, since he has not abandoned his homeland nor given up the diplomatic support of his country as has the resident alien.[109] In addition, there is no fundamental right involved if the nonresident alien is making his purchase of United States land for financial advancement.[110] Thus a nonresident alien's attack upon restrictive legislation would be judged by the lower standard.[111] In such cases, legislation limiting or prohibiting ownership would likely be upheld, since there exists a rational rela-

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[105] 5 VAND. J. TRANSNAT'L L. 535, 541 (1972).

[106] *See* Comment, *Our Land Is Your Land: Ineffective State Restriction of Alien Land Ownership and the Need for Federal Legislation*, 13 J. MAR. L. REV. 679, 702 (1980) (nonresident aliens equal 90% of world's population and are not entitled to protection).

[107] *See* note 105 and accompanying text *supra*.

[108] MONITORING, *supra* note 18, at 24.

[109] Morrison, *supra* note 9, at 643.

[110] *Id.* at 642-43. It should be noted that a resident alien can argue that his purchase of land was needed for gainful employment, which has been held to be constitutionally protected. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948). *See* notes 85, 86 and accompanying text *supra*.

[111] Morrison, *supra* note 9, at 643.

tionship between the classification, the restriction of alien property possession, and the state purpose of excluding alien influence.[112]

Federal regulations are also subject to equal protection scrutiny.[113] However, federal laws limiting alien ownership of property are more likely than state laws to withstand attack because the federal government has supremacy over national matters.[114] For example, the Foreign Assets Control Regulations[115] may be used to prohibit certain nationals from owning American land. Furthermore, during a declared war, federal law provides for the regulation of property held by enemy aliens.[116] From these examples it is readily apparent that federal regulations, unlike state laws, are selective in their operation.[117]

The disparity of treatment between resident and nonresident aliens may be challenged as irrational.[118] Present cases, however, indicate that the equal protection clause would not help the nonresident alien challenging of restrictive legislation.[119] Without a fundamental right involved in his proprietary interest, the nonresident alien would not receive strict judicial review. Under the lower standard, it would be difficult to convince a court that the restriction was not rationally related to the state purpose of excluding foreign influence.

B. Due Process Challenges

The substantive due process arguments of the fourteenth amendment do not present a powerful challenge to ownership retriction laws.

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[112] *Id.*

[113] *See* Shapiro v. Thompson, 394 U.S. 618, 641 (1969) (federal statutes may not violate equal protection clause); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (constitution forbids discrimination by federal government); Morrison, *supra* note 9, at 643.

[114] *See* notes 131 through 134 and accompanying text *infra*. Two federal policies, however, were struck down as discriminatory. *See* Mow Sun Wong v. Hampton, 500 F.2d 1031, 1040-41 (9th Cir. 1974) (discrimination against aliens in federal civil service regulations unconstitutional), *aff'd.* 426 U.S. 88, 116-17 (1976); Ramos v. United States Civil Serv. Comm'n, 376 F. Supp. 361, 368 (D.P.R. 1974) (discrimination against aliens in disaster loan program unconstitutional).

[115] 31 C.F.R. §§ 500.101 through .809 (1980). Assets of citizens of the People's Republics of China, Cambodia, North Korea, and Viet Nam have been controlled under these regulations. Similar regulations limit property transactions in the United States by the governments of Cuba and Iran. 31 C.F.R. §§ 515.201 through .204 (1980); *id.* §§ 535.101 through .904.

[116] 50 U.S.C. app. § 5 (1976 & Supp. III 1979).

[117] *See* notes 131 through 134 and accompanying text *infra*. The federal government has such powers under the constitution.

[118] *See* notes 111, 112 and accompanying text *supra*.

[119] *See* notes 80, 81 and accompanying text *supra*.

Due process of the law requires a legitimate purpose for the classification, whereas equal protection examines the legitimacy of the classification itself.[120] The judicial review used in due process cases is similar to the lower standard applied in equal protection cases. Thus, due process requirements may be satisfied simply by showing a rational relationship between the law's purpose and a legitimate state interest.[121] However, due process challenges provide clarification of the purposes of laws and thus aid in their constitutional examination under other applicable tests.

The due process clause of the fourteenth amendment subjects the nonresident alien to an unsettled area of the law.[122] In *Shames v. Ne-*

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[120] Morrison, *supra* note 9, at 645.

[121] North Dakota State Bd. of Pharmacy v. Snyder's Drug Store, Inc., 414 U.S. 156, 164-67 (1973).

[122] Several cases have supported an extension of due process to nonresident aliens. *See, e.g.*, United States v. Pink, 315 U.S. 203, 228 (1942) (aliens as well as citizens entitled to protection of fifth amendment due process); Russian Vol. Fleet v. United States, 282 U.S. 481, 489 (1931) (nonresident alien's contract to build ships protected by due process clause of fifth amendment); Sardino v. Federal Reserve Bank, 361 F.2d 106, 111 (2d Cir.) (nonresident alien entitled to due process protection), *cert. denied*, 385 U.S. 898 (1966).

Other decisions have opposed the vesting of due process rights in nonresident aliens, restricting those rights instead to aliens within the territorial jurisdiction of the United States. For example, the Court in Yick Wo v. Hopkins, 118 U.S. 356 (1886), noted that the fourteenth amendment was universal in application "to all persons within the territorial jurisdiction without regard to . . . nationality." *Id.* at 369. In his concurring opinion in Bridges v. Wixon, 326 U.S. 135 (1945), Justice Murphy noted that:

> [A]n alien . . . brings with him no constitutional rights . . . . The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the right guaranteed by the Constitution to all people within our borders. Such rights include . . . the due process clause of the Fourteenth Amendment.

Id. at 161. Later, the Court in Johnson v. Eisentrager, 339 U.S. 763 (1950), noted that "[i]n extending constitutional protections [to aliens], the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Id.* at 771. Other courts have noted this territorial view of alien rights. For example, in a determination of whether Canadian residents commuting daily across the border to work in the United States should receive full constitutional protection, the Ninth Circuit Court of Appeals stated that "[a]ny person within the United States, citizen or alien, resident or nonresident, is protected by the guarantees of the Constitution." Sam Andrews' Sons v. Mitchell, 457 F.2d 745, 749 (9th Cir. 1972).

In sum, under the territorial concept of alien rights expressed in these cases, a nonresident landowner might, by making an appearance in the United States, assert the due process clause to resist any attempt by a state to confiscate his property under that state's restrictive alien land ownership law.

braska,[123] the district court avoided this troublesome area when asked to rule on the constitutionality of a state statute requiring certain property inherited by a nonresident alien to escheat to the state. By holding that the statute did not violate the due process clause,[124] the court did not have to address the issue whether the due process clause applies to nonresident investors.[125] The court in *Shames* echoed the earlier Supreme Court decision in *Terrace v. Thompson*,[126] a case which held that a state may bar ownership of its land by nonresidents without violating due process.[127]

C. *Compensation and Preemption*

As previously stated, a state law restricting nonresident alien ownership of land will not be invalidated by the due process clause. However, the foreign investor may receive some protection through the fourteenth amendment's incorporation of the fifth amendment, which provides compensation for the taking of property for public use.[128] Thus, an argument may be made that the state must compensate the nonresident alien if it confiscates his property.[129]

Article VI of the United States Constitution,[130] the supremacy clause, also offers an indirect constitutional limitation on state legislation regarding alien ownership of real estate. The federal government has exclusive control over foreign affairs[131] and the making of treaties, which are the "Supreme Law of the Land."[132] Since a federal law

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[123] 323 F. Supp. 1321 (D. Neb. 1971).

[124] *Id.* at 1335.

[125] *Id.* at 1333.

[126] 263 U.S. 197 (1923).

[127] The *Shames* court viewed the *Terrace* holding as controlling precedent on the substantive merits of a due process challenge to nonresident alien regulation: "[A] state's absolute bar of ownership of land by nonresident aliens has been held by the Supreme Court to be within the valid exercise of that state's police power, and not violative of due process of law under the Fourteenth Amendment." 323 F. Supp. at 1334.

[128] *See* Chicago B. & Q.R.R. v. City of Chicago, 166 U.S. 226, 241 (1897) (due process clause of fourteenth amendment requires just compensation be paid to owners of property condemned by the state). For a list of cases which imply a due process violation if a nonresident alien's property is confiscated without compensation, see note 122 *supra*. *But see* Pennsylvania Cent.Transp. Co. v. New York City, 438 U.S. 104, 122-28 (1977) (discussion of cases in which just compensation was not required upon governmental taking).

[129] Note, *supra* note 16, at 513 n.158.

[130] U.S. CONST. art. VI.

[131] Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (Chinese Exclusion Case).

[132] U.S. CONST. art. VI, § 2.

preempts a conflicting state law,[133] treaties override inconsistent state legislation.[134]

D. Application of Naturalization, Commerce, and National Defense

The federal domain of regulation includes naturalization,[135] interstate and foreign commerce,[136] and national defense.[137] Federal power over naturalization and citizenship was the basis for invalidating alien restrictions in *Takahashi v. Fish and Game Commission*[138] and *Graham v. Richardson*.[139] The state limitations which affected the resident alien's ability to earn a living were contrary to the federal government's permission to the alien to establish permanent residence in the United States, and were thus ruled invalid.[140] Land laws may be viewed in a similar manner. At this time, however, no federal law comprehensively regulates foreign investment by nonresidents.[141] There-

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[133] Pennsylvania v. Nelson, 350 U.S. 497, 509 (1956) (state law preempted by federal Smith Act); Hines v. Davidowitz, 312 U.S. 52, 74 (1941) (state alien registration law preempted by federal provision).

[134] *See, e.g.*, Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (state law in conflict with federal treaty void); Hauenstein v. Lynham, 100 U.S. 483, 490 (1880) (federal treaty given effect over state law).

[135] U.S. CONST. art. I, § 8, cl.4; *see* Henderson v. Mayor of New York, 92 U.S. 259, 273 (1876) (states cannot exclude aliens admitted by federal government).

[136] U.S. CONST. art. I, § 8, cl.3.

[137] *Id.* at cl. 12.

[138] 334 U.S. 410 (1948).

[139] 403 U.S. 365 (1971).

[140] This protection does not extend to illegal aliens. *See* DeCanas v. Bica, 424 U.S. 351, 356 (1976) (valid exercise of police power to prohibit hiring of illegal aliens).

[141] Present federal laws generally affect foreign investment in specific industries. *See* 10 U.S.C. § 2272 (1976) (foreign participation in design and/or construction of military aircraft regulated); *id.* § 7435 (foreign leasing of naval petroleum reserve lands regulated); 12 U.S.C. §§ 1301-1308 (Supp. III 1979) (foreign investment in banking regulated); 16 U.S.C. § 797(e) (1976) (foreign participation in dam construction prohibited); 30 U.S.C. § 181 (1976) (foreign leasing of U.S. mineral lands regulated); *id.* § 1015 (foreign leasing for geothermal production prohibited); 33 U.S.C. §§ 1502(5), 1503(g) (1976) (foreign participation in deep water port operation and construction prohibited); 40 U.S.C. § 782 (1976) (foreign participation in Alaskan long-line communication prohibited); 42 U.S.C. §§ 2133, 2134 (1976) (foreign participation in atomic energy prohibited); 46 U.S.C. §§ 802, 835, 1151, 1152 (1976) (foreign participation in shipping industry regulated); 47 U.S.C. § 17222 (1976) (foreign participation in telegraph industry regulated); *id.* § 310 (Supp. III 1979) (foreign operation of radio station prohibited).

The bases of the federal laws are national defense, as well as foreign relations. Therefore, the federal law regulating alien ownership of private property does not focus on the same matters as do state laws on that subject. With the exception of seizure of the

fore, state laws which limit nonresident alien investment are not a direct invasion of the immigration and naturalization laws.

The federal government has the power to regulate both interstate and foreign commerce.[142] Whether state regulations against foreign land purchasers interfere with foreign commerce may be examined from two perspectives. First, one may argue that land ownership does not fall within the scope of commerce, but rather is a local matter within the state's power.[143] Second, the interest of the state in controlling foreign investment does not fall within the state's commonly accepted police power, which includes health, safety, and welfare.[144] Despite these attacks on state laws through the foreign commerce power, the federal government has given tacit approval to state restrictions in this area by recognizing in recent treaties that state legislation regarding ownership and inheritance of land would apply.[145] Without federal legislation to displace state law, state statutes will probably not be invalidated on the sole basis that they interfere with the commerce clause.[146]

When the state is dealing with an enemy or hostile alien, federal legislation overrides any contrary state law.[147] For example, the Trading with the Enemy Act[148] provides for the Foreign Asset Control Regulations,[149] which permit the freezing of assets of certain countries.[150]

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assets of hostile aliens, there exists no federal legislation limiting foreign investment in privately-owned United States property.

[142] Congress has the exclusive power to "regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. *See* Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (Congress may regulate specific businesses based on interstate commerce power); Board of Trustees v. United States, 289 U.S. 48, 58 (1933) (federal power to impose tariffs on goods); Weber v. Freed, 239 U.S. 325, 329 (1915) (federal power to restrict imports).

Foreign commerce appears to receive more protection against state regulation than does interstate commerce. *See, e.g.*, Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 459 (1827) (state regulation of imports of foreign goods repugnant to Constitution).

[143] *See* note 11 and accompanying text *supra*.

[144] *E.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 143 (1970) (statute regulating fruit containers valid exercise of police power); Breard v. Alexandria, 341 U.S. 622, 640 (1951) (door-to-door sales law valid exercise of police power).

[145] Morrison, *supra* note 9, at 657-59.

[146] *Id.* at 652.

[147] Congress has the exclusive power "to raise and support Armies." U.S. CONST. art. I, § 8, cl. 12. Under this power, Congress may also make peacetime provisions necessary for national defense. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 340 (1936) (construction of dam important to national defense).

[148] 50 U.S.C. app. § 5 (1976 & Supp. III 1979).

[149] 31 C.F.R. §§ 500.101 through .809 (1980).

[150] *See* note 115 *supra*.

When extreme hostility arises between a country and the United States, the country may be added to the proscribed list without a formal declaration of war.[151]

III. The Effect of Foreign Relations on the Rights of Aliens

A. *The Impact of Treaties*

Valid treaties affect both state and federal laws, although new federal legislation overrides a preexisting treaty.[152] A treaty supersedes inconsistent state laws[153] and creates an obligation for the federal government under international law.[154] Furthermore, a state statute dealing with matters previously left to the state will be superseded by a valid treaty that grants to a party rights inconsistent with the statute.[155] Therefore, treaty rights offer the most common defense to enforcement of alien land restrictions.

Two specific types of treaties affect the foreign investor and state laws regulating investment. The first type, the bilateral treaty of friendship, commerce, and navigation, has extended national treatment to the majority of major investing nations.[156] The second type, the multilateral treaty, generally deals with a particular activity or problem.[157] However, there are few multilateral treaties regarding land because of difficulties in establishing uniform agreements in this area.[158]

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[151] *E.g.*, Iranian Assets Control Regulations, 31 C.F.R. §§ 535.101 through .904 (1980) (restrictions on United States real estate owned by Iranians).

[152] Reid v. Covert, 354 U.S. 1, 18 (1957); Moser v. United States, 341 U.S. 41, 45 (1951).

[153] The classic case is Hauenstein v. Lynham, 100 U.S. 483, 488-89 (1880) (state law that required escheat to state of real estate of aliens dying intestate preempted by treaty).

[154] A treaty is not a total constitutional restriction upon later national legislation. Treaties may be terminated by the President. If the United States repudiates a binding treaty, it is responsible for its breach of international law. In addition, subsequent inconsistent legislation is viewed as an implicit repeal of the effect of the treaty. Morrison, *supra* note 9, at 656-57.

[155] *See* Missouri v. Holland, 252 U.S. 416, 434-35 (1920) (state statute inconsistent with treaty invalid).

[156] *See, e.g.*, U.S. Dep't of State, Treaties in Force 1-245 (1981) (bilateral treaties in force Jan. 1, 1981).

[157] Morse, *Legal Structures Affecting International Real Estate Transactions*, 26 Am. Univ. L.Rev. 34, 38-39 (1976).

[158] The one significant multilateral agreement regarding foreign investment is the Organization for Economic Cooperation and Development Code. *See* Organization for Economic Cooperation and Development, *opened for signature*, Dec. 14, 1960, [1961] 2 U.S.T. 1728, 1751-52, T.I.A.S. No. 4891 (adherence of United States); Note, *The Rising*

Bilateral treaties of friendship, commerce, and navigation may be divided according to the era during which the treaty was negotiated. The pre-World War II treaties are selective, in that they cover only the problems the parties had at that time.[159] Post-World War II treaties are more comprehensive, however, and the most recent treaties offer national treatment to the foreign investor.[160] Such treatment means that the foreign contracting party is subject to the same restrictions that apply to American citizens. In exchange, United States citizens receive the same privileges abroad.[161] Recent bilateral treaties of friendship, commerce, and navigation permit the alien to engage in all types of commercial, industrial, and financial activities.[162]

In allowing foreign investors to do business in the United States, many treaties provide for the right to obtain land for operation of businesses.[163] However, these rights are not without restrictions. Most treaties expressly state that the United States has the right to limit or to exclude foreign activity in the exploitation of natural resources.[164] In addition, treaties often recognize state land law.[165] Modern agreements have protected the inheritance rights of aliens, however, by granting a specified time period to dispose of land in states which prohibit alien ownership.[166] Yet, in offering such protection, a treaty implies that the federal government permits state land ownership restrictions.[167]

Another feature of many of these treaties is the "most favored nation" clause, which grants a nation the most beneficial treatment given

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Tide of Reverse Flow: Would a Legislative Breakwater Violate U.S. Treaty Commitments?, 72 MICH. L. REV. 551, 557-80 (1974) (discussion of Code of Liberalization of Capital Movement).

[159] Morrison, *supra* note 9, at 657-58.

[160] *Id.* at 658-59.

[161] *See, e.g.*, Treaty of Friendship, Commerce and Navigation with the Netherlands, March 27, 1956, art. VII, para. 1, [1957] 8 U.S.T. 2043, T.I.A.S. No. 3942 (treaty provisions with reciprocal treatment of investors).

[162] Note, *supra* note 14, at 92.

[163] *E.g.*, Netherlands Treaty, *supra* note 161, at art. IX, para. 1. Few treaties, however, give a direct grant or denial of the right to own United States property. One exception is a treaty with France providing that nationals of both countries must receive governmental approval before purchasing real estate in the other country. Protocol to Convention of Establishment, Nov. 25, 1959, United States-France, para. 14, [1960] 11 U.S.T. 2398, 2423, T.I.A.S. No. 4625.

[164] *E.g.*, Netherlands Treaty, *supra* note 161, at art. VII, para. 2.

[165] *E.g., id.* at art. IX, para. 1(b).

[166] *E.g., id.* at para. 4; *see* Morse, *supra* note 157, at 40 (reasonable time three to five years).

[167] Morrison, *supra* note 9, at 660.

any alien in the country.[168] Approximately seventeen United States treaties contain an unconditional most favored nation clause.[169]

In sum, bilateral treaties have broad impact, permitting alien ownership of urban residential, industrial and commercial property.[170] Depending on the specific treaty limitations, ownership privileges may not be extended to agricultural land.[171] However, the national treatment provided for in most recent treaties of friendship, commerce, and navigation offers almost complete investment freedom.[172] Moreover, even though several treaties legitimate anti-alien inheritance state laws, they mitigate these laws by extending time for disposal of the land.[173]

B. State Laws Intruding Upon Foreign Affairs

No state may have its own independent foreign policy.[174] Whether state statutes regulating alien land possession constitute an invasion of the federal foreign relations power depends upon one's view of the state laws. Historically, when viewed as a control of property rights, the statutes have been deemed to deal with a local concern.[175] If the statutes are viewed as restraints on aliens, however, they enter the realm of international concern, and reach beyond the power of the

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[168] *Id.* Thus, citizens of a country with which the United States has a most favored nation treaty are entitled to the same rights and privileges granted by treaty to citizens of other nations.

[169] Note, *supra* note 14, at 94.

[170] Morrison, *supra* note 9, at 661.

[171] *See, e.g.*, Convention of Establishment, Nov. 25, 1959, United States-France, art. VII, para. 2, [1960] 11 U.S.T. 2398, T.I.A.S. No. 4625, 401 U.N.T.S. 75 (either party may impose restrictions on alien ownership of certain interests); Treaty of Friendship, Commerce, & Navigation, Apr. 2, 1953, United States-Japan, art. IX, para. 2, [1953] 4 U.S.T. 2063, T.I.A.S. No. 2863, 206 U.N.T.S. 143 (same).

[172] Note, *supra* note 14, at 92. The author stated:

> There is almost no limit to the type of commercial activity they [treaty aliens] can engage in: they can organize or create new industry or an industrial plant, and can purchase or hold real estate as easily as any American citizen, regardless of state statutory language to the contrary. There is no numerical limitation as to percentage of control or absolute acreage to limit their holding.

Id.

[173] *See* De Tenorio v. McGowan, 510 F.2d 92, 96 (5th Cir. 1975) (treaty allowed three years for nonresident alien to sell interest); note 204 and accompanying text *infra*.

[174] Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (Chinese Exclusion Case).

[175] Terrace v. Thompson, 263 U.S. 197, 217-18 (1923); Blythe v. Hinckley, 180 U.S. 333, 341-42 (1901); *cf.* Younger v. Harris, 401 U.S. 37, 44 (1971) (states should be free to carry out their distinctive functions).

states, since the focus shifts from land to relationships beyond national boundaries.[176]

In *Zschernig v. Miller*,[177] the United States Supreme Court established the principle that a state law which intrudes upon the field of foreign affairs may be invalidated.[178] In this case, a state statute restricting alien inheritance rights was used by the state courts to question the veracity of diplomatic certificates and to engage in its own political inquiries. The Court struck down the statute.[179]

Under *Zschernig*, the type of state intrusion that will be viewed as too diplomatically sensitive to be permitted is unclear.[180] Although an argument may be made that any state law that discriminates against nonresident aliens represents an impermissible intrusion into foreign relations,[181] this argument has not been upheld by the Supreme Court. However, a state law that directly discriminates against particular countries, or directly favors specific nations, would appear to be an establishment of an independent foreign policy and therefore to be subject to invalidation as an intrusion upon federal power over foreign affairs.[182]

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[176] *See* U.S. CONST. art. 1, § 10 (no state shall enter treaty).

[177] 389 U.S. 429 (1968).

[178] *Id.* at 432.

[179] *Id.* at 441. *But cf.* Clark v. Allen, 331 U.S. 503, 516-18 (1947) (state statute conditioning alien inheritance rights on reciprocity held not violative of federal power). Since *Clark* was not overruled by *Zschernig*, some courts have interpreted this to mean that *Zschernig* can be limited to its facts. In Bjarsch v. DiFalco, 314 F. Supp. 127 (S.D.N.Y. 1970), the court, construing *Clark* and *Zschernig*, held that statutes restricting alien inheritance do not intrude upon federal foreign policy. *Id.* at 133; *see In re* Kish's Estate, 52 N.J. 454, 246 A.2d 1, 8 (1968) (outlining limitations of *Zschernig*).

[180] In *Zschernig* Justice Douglas stated:

> It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. The practice of state courts in withholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious. The several States, of course, have traditionally regulated the descent and distribution of estates. *But those regulations must give way if they impair the effective exercise of the Nation's foreign policy.*

389 U.S. at 440 (emphasis added) (footnote omitted) (citing Berman, *Soviet Heirs in American Courts*, 62 COLUM. L. REV. 257 (1962); Chaitkin, *The Rights of Residents of Russia and Its Satellites to Share in Estates of American Decedents*, 25 S. CAL. L. REV. 297 (1952)).

[181] Note, *Alien Inheritance Statutes: An Examination of the Constitutionality of State Laws Restricting the Rights of Nonresident Aliens to Inherit from American Decedents*, 25 SYRACUSE L. REV. 597, 621-22 (1974).

[182] Morrison, *supra* note 9, at 649; *see* notes 183 through 186 and accompanying text *infra*.

IV. Mississippi Law Affecting Alien Ownership of Land

A. Statutory Limitations

The Mississippi statute,[183] which exempts Syrians and Lebanese from the nonresident alien ownership prohibition is particularly vulnerable to constitutional attack. The statute provides that "citizens of Syria or the Lebanese Republic may inherit property from citizens or residents of the State of Mississippi."[184] Such national favoritism indicates the exercise of too much independent foreign policy.[185] Thus, the statute should be invalid under the doctrine of exclusive federal power over foreign relations.[186]

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[183] Miss. Code Ann. § 89-1-23 (1972) provides:

> Resident aliens may acquire and hold land, and may dispose of it and transmit it by descent, as citizens of the state may. Nonresident aliens shall not hereafter acquire or hold land, but a nonresident alien may have or take a lien on land to secure a debt, and at any sale thereof to enforce payment of the debt may purchase the same, and thereafter hold it, not longer than twenty years, with full power during said time to sell the land, in fee, to a citizen; or he may retain it by becoming a citizen within that time. All land held or acquired contrary to this section shall escheat to the state; but a title to real estate in the name of a citizen of the United States, or a person who has declared his intention of becoming a citizen, whether resident or nonresident, if he be a purchaser or holder, shall not be forfeited or escheated by reason of the alienage of any former owner or other person.
>
> Any person who was or is a citizen of the United States and became or becomes an alien by reason of marriage to a citizen of a foreign country, may hereafter inherit, or if he or she heretofore inherited or acquired or hereafter inherits, may hold, own, transmit by descent or transfer land free from any escheat to the State of Mississippi, if said land has not heretofore escheated by final valid order or decree of a court of competent jurisdiction.
>
> *Nonresident aliens who are citizens of Syria or the Lebanese Republic may inherit property from citizens or residents of the State of Mississippi.*

Id. (emphasis added).

[184] *Id.* This exemption has been in effect since 1938, but the reason for its addition to the statute is unknown. 1938 Miss. Laws, ch. 354. Because of the most favored nation treaties, the privileges extended to the citizens of Lebanon and Syria may also be enjoyed by the citizens of Spain, Sweden, Yugoslavia, and Argentina. Sullivan, *supra* note 3, at 20 n.25.

[185] Morrison, *supra* note 9, at 649.

[186] *Id.* Morrison raises a remedial problem:

> If the "special status" is void, other aliens would probably have no standing to sue; the only potential plaintiffs with an interest in challenging the law would be the next class of resident heirs, excluding nonresident aliens. In the common situation there are none, so the resident claimant is the state, but it may be precluded from arguing the substantive invalidity of its own laws.

Id. at 649 n.174.

The Mississippi limitation is based upon the residential status of the alien.[187] Seven other states have similar laws; they permit resident aliens to obtain real estate but limit landholding by nonresident aliens.[188] The Mississippi restriction on land ownership is not total, since the nonresident alien may purchase land at a foreclosure sale or take a lien to secure a debt and hold the lien or the land for up to twenty years.[189] If the nonresident alien declares his intention to obtain United States citizenship, he may retain the Missisisppi land indefinitely.[190]

B. Inheritance by Aliens

Two recent cases have dealt with the inheritance aspect of the alien landholding statute. In *Guiseppe v. Cozzani*,[191] Italian heirs of decedent Frank Toney, a resident of Vicksburg, claimed property in Mississippi under Toney's will.[192] However, a niece residing in Mississippi conspired with her son to take sole possession of the property.[193] Under a 1948 treaty with Italy, nonresident aliens receive due process of the law and three years to dispose of inherited property.[194] The Italian relatives, however, did not bring suit until twenty-five years after the interests in the property vested in Mississippi relatives.[195] The Mississippi Supreme Court held that the niece was a tenant in common with the Italian heirs[196] and was, therefore, a fiduciary and unable

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[187] MISS. CONST. art. 4, § 84 provides authority for statutory restrictions on nonresident aliens: "The legislature shall enact laws to limit, restrict, or prevent the acquiring and holding of land in this state by nonresident aliens, and may limit or restrict the acquiring or holding of lands by corporations." For a listing of applicable Mississippi statutes, see note 8 *supra*.

[188] *See* note 71 *supra*.

[189] MISS. CODE ANN. § 89-1-23 (1972). For the text of the statute, see note 183 *supra*.

[190] MISS. CODE ANN. § 89-1-23 (1972); State *ex rel.* Brown v. Scottish Am. Mortgage Co., 111 Miss. 98, 106-07, 71 So. 291, 294 (1916).

[191] 193 So. 2d 549 (Miss. 1967). This case had been before the supreme court on two previous occasions. On its first appearance, the supreme court reversed a general demurrer to the amended complaint and remanded the cause for trial on the merits. Guiseppe v. Cozzani, 238 Miss. 273, 276, 280, 118 So. 2d 189, 189, 192 (1960). On its second appearance, the trial court had dismissed the complaint for delay. The supreme court again reversed and remanded for a trial on the merits. Guiseppe v. Cozzani, 248 Miss. 588, 595, 159 So. 2d 278, 281 (1964).

[192] 193 So. 2d at 552.

[193] *Id.* at 553.

[194] Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States-Italy, art. V, para. 2, art. VII, para. 2, 63 Stat. 2255, T.I.A.S. No. 1965.

[195] 193 So. 2d at 550, 552.

[196] *Id.* at 552.

to claim the land by adverse possession.[197] Because of the concealed fraud of the Mississippi relative, the Italian relatives were not barred from maintaining a suit in equity.[198]

In *DeTenorio v. McGowan*,[199] the district court reviewed facts similar to those in *Guiseppe* and held that a Honduran widow could not be divested of her interest in certain Mississippi land.[200] The Fifth Circuit reversed.[201] In this case, E.J. McGowan, a former Mississippian, died in Panama leaving his Honduran wife as his heir.[202] The surviving relatives of McGowan in Mississippi included his brother Hamilton, who had managed E.J. McGowan's Mississippi property for fifty-seven years.[203] Under a United States treaty with Honduras, the widow had three years to divest herself of the inherited land,[204] but that period had expired eleven years before suit was brought.[205] The treaty also stated that the time might "be reasonably prolonged if circumstances render it necessary."[206] The district court viewed Hamilton's failure to give his brother's widow actual notice of the property's existence as the required necessity for prolonging the three year divestiture period.[207] Chief Judge James P. Coleman, writing for the Fifth Circuit, held that Hamilton was neither a fiduciary nor a tenant in common and, therefore, owed no duty of notice to the widow.[208] Chief Judge Coleman further distinguished *DeTenorio* from *Guiseppe* on the basis that *Guiseppe* "turned on fraud, not on an extension of time under a Treaty."[209] After the three year period had expired without any action

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[197] *Id.* at 553 (quoting Nichols v. Gaddis & McLaurin, Inc., 222 Miss. 207, 221, 75 So. 2d 625, 629 (1954)).

[198] 193 So. 2d at 554. The niece in Mississippi had sold three parcels of the land during the 25 years that the Italian nieces and nephews had title. *Id.* at 552. The supreme court remanded for a decision on the respective ownership interests and an accounting of the proceeds from the sale and rental of the property between 1933 and 1967. *Id.* at 554.

[199] 364 F. Supp. 1051 (S.D. Miss. 1973), *rev'd*, 510 F.2d 92 (5th Cir.), *cert. denied*, 423 U.S. 877 (1975).

[200] 364 F. Supp. at 1062.

[201] 510 F.2d 92 (5th Cir.), *cert. denied*, 423 U.S. 877 (1975).

[202] 510 F.2d at 94. McGowan died intestate on Oct. 31, 1957. *Id.* His wife died intestate on Feb. 28, 1969. *Id.* at 95. The wife's sister brought suit. *Id.*

[203] *Id.* Hamilton paid the taxes, but acknowledged his brother's ownership. *Id.*

[204] *Id.* at 96 (quoting Treaty of Friendship, Commerce and Consular Rights, Dec. 7, 1927, United States-Honduras, art. IV, 45 Stat. 2618, T.S. No. 764).

[205] 510 F.2d at 96, 108.

[206] *Id.* at 96 (quoting Treaty, *supra* note 204, at art. IV).

[207] 364 F. Supp. at 1062.

[208] 510 F.2d at 100.

[209] *Id.* at 102.

by the Honduran widow, the land descended to E.J. McGowan's brothers and sisters.[210]

Judge Godbold, in dissent, argued that Hamilton McGowan was a fiduciary and that no fraud need exist for a fiduciary to be held liable.[211] Judge Godbold stressed that a fiduciary relationship exists in domestic, personal situations, as well as in legal, conventional ones.[212] Thus, Hamilton had a duty to communicate the fact of his brother's property ownership to the Honduran widow.[213] The majority held that the widow should have inquired whether her husband owned any Mississippi land[214] and that she had constructive notice of the land ownership under Mississippi's recording statutes.[215] The dissent dismissed the widow's failure to inquire on the grounds that Hamilton was a fiduciary and owed a duty to disclose the facts.[216] The effect given the recording statute was viewed by the dissent as contrary to the holding in *Guiseppe* that actual notice was required.[217]

C. *Constitutional Problems*

In *DeTenorio*, the Mississippi law withstood a constitutional attack when the court held that the fourteenth amendment was inapplicable to an alien not within the state's jurisdiction.[218] Furthermore, the Mississippi statute avoids some of the equal protection problems faced by similar statutes of other states. In the South Carolina regulations,[219]

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[210] *Id.*; *see* MISS. CODE ANN. § 91-1-3 (1972) (descent of land).

[211] 510 F.2d at 102, 106.

[212] *Id.* at 103 (quoting Ham v. Ham, 146 Miss. 161, 173, 110 So. 583, 584 (1926) (fiduciary relationship held between brothers)).

[213] 510 F.2d at 107.

[214] *Id.* at 99.

[215] *Id.*; *see* Frierson Bldg. Supply Co. v. Pritchard, 253 Miss. 541, 552, 176 So. 2d 301, 305 (1965) (purpose of recording statutes is to give constructive notice); Aultman v. Kelly, 236 Miss. 1, 7, 109 So. 2d 344, 347 (1959) (recorded deed gives constructive notice).

[216] 510 F.2d at 111.

[217] *Id.* The Mississippi Supreme Court in *Guiseppe* stated, "How could this Court or any court hold that these illiterate people, 4,000 miles away, were given actual notice or the equivalent thereof by the filing of pleadings and deeds in the Warren County Chancery Clerk's Office in Vicksburg, Mississippi?" 193 So. 2d at 554.

[218] 510 F.2d at 101. The Lebanese and Syrian exemption was the subject of the constitutional attack. The court did not address the argument that the statute intrudes upon federal foreign affairs. *See* notes 174 through 186 and accompanying text *supra*. The court noted, however, that even if one part of the statute were declared unconstitutional, the other parts would remain unimpaired. 510 F.2d at 101; *see* 1940 Miss. Laws, ch. 237, § 4 (severability clause).

[219] S.C. CODE ANN. § 27-13-30 (1976).

for example, the use of the word "alien" without a description of residential status discriminates against the resident alien, a protected class under *Graham v. Richardson*.[220] Similarly, statutes that allow ownership for "citizens of the United States" face equal protection invalidation.[221] State regulations based on nonresidential status are less likely to be held unconstitutional than statutes which do not differentiate between resident and nonresident aliens.[222]

State statutes which forbid foreign investments if the purchaser is an alien enemy will be preempted by the federal foreign affairs power.[223] The distinction between the statutory description of an alien in the Georgia code's use of "at peace"[224] and Virginia's use of "enemy"[225] presents a significant difference in a time of few declared wars. However, all statutes that invade the federal policies of war and peace are prohibited by the constitution.[226]

V. Enforcement Problems

A. Circumvention of Anti-Alien Statutes

In addition to the constitutional problems which many state alien land laws face, the regulations often contradict the state policy of encouraging foreign investment.[227] For six years, Mississippi maintained an office in Brussels to encourage foreign investors.[228] Yet, at the same time the Mississippi law expressly prohibited ownership of land by nonresident aliens.[229] This inconsistency in state policy poses a prob-

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[220] 403 U.S. 365, 375-76 (1971); *see* notes 87 through 89 and accompanying text *supra*.

[221] *E.g.*, Tex. Rev. Civ. Stat. Ann. art. 1537 (Vernon 1980). *But see* Note, *supra* note 158, at 569. Individual states are free to discriminate against out-of-state investors when they do not make a distinction between out-of-state American investors and treaty alien investors. *Id.*

[222] Note, *supra* note 14, at 98.

[223] *See* notes 174 through 186 and accompanying text *supra*.

[224] Ga. Code Ann. § 79-303 (1973).

[225] Va. Code § 55-1 (1981).

[226] U.S. Const. art. I, § 10, cl. 3.

[227] *See* note 16 *supra*.

[228] Telephone conversation with the Marketing Division of the Mississippi Department of Economic Development, Jackson, Miss., March 16, 1981. The Brussels office closed, however, in March, 1980. The Marketing Division office declined to comment on the reason for the closing. The small increase in foreign investment in Mississippi between 1974 and 1980 may provide the explanation.

[229] Miss. Code Ann. § 89-1-23 (1972). For the full text of the statute, see note 183 *supra*.

lem only to the less financially powerful alien,[230] however, because the educated and wealthy nonresident investor may bypass the state law through the use of corporations and trusts.[231] Constitutional challenges to the Mississippi statute, therefore, are unnecessary in light of the mechanical ineffectiveness of the statute.

The corporation, the most common business entity in the United States, offers a simple method for the alien investor to avoid state laws which prohibit only individual alien ownership.[232] Despite this obvious form of evasion, few states have enacted legislation to control land acquisition by alien corporations. The scarcity of regulations in this area may be attributed to the fact that few corporations existed at the time anti-alien statutes were enacted.[233]

A corporation which is not engaged in interstate commerce possesses only those rights given to it by the state in which it is doing business.[234] With the large number of corporations now in operation, states can no longer effectively screen the corporations that apply to do business within their boundaries. In addition, corporate purpose clauses now allow almost all legitimate businesses to incorporate and to own land.[235]

Mississippi has no statute restricting corporate ownership of private lands. Thus, a nonresident alien may easily avoid the prohibition of individual ownership by use of a corporation. Even in those states that do have corporate restrictions,[236] the serious alien investor is not hampered, since the statutes are often poorly drafted. Without express prohibitions as to which corporations will be restricted and without strict disclosure regulations, the statutes are an ineffective control over

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[230] *See* Morrison, *supra* note 9, at 634, 637 (state restrictions fail to affect major alien investment).

[231] *Id.* at 623, 634-37; Weisman, *Restrictions on the Acquisition of Land by Aliens*, 28 AM. J. COMP. L. 39, 52-53 (1980).

[232] *See* F. MORRISON & K. KRAUSE, *supra* note 27, at 23.

[233] *Id.* at 21. The alien investor avoids statutory restrictions on land ownership by virtue of the fact that, as a shareholder, he owns an interest in the corporation owning the land, but not an interest in the land itself. *Id.* at 35.

Some states, however, do restrict alien land ownership through corporations. For example, Iowa and Nebraska exclude corporations with a majority of alien shareholders from ownership of land, while Wisconsin precludes such ownership if nonresident aliens hold more than 20% of the corporate shares. Morrison, *supra* note 9, at 634.

[234] Morrison, *supra* note 9, at 636.

[235] *See, e.g.*, ABA-ALI MODEL BUS. CORP. ACT §§ 3, 4(d) (1979) (corporate purpose and power).

[236] *See* note 233 *supra*.

alien corporate ownership.[237] In addition, the financially powerful alien corporation may obtain legislative exemption.[238]

Another way in which the alien investor may avoid state land restrictions is through the use of a trust. The foreign purchaser may obtain land through a local broker or trustee.[239] Even though the deed may show that a trustee is acting in his representative capacity, it will not always identify the beneficiary of the trust, the actual purchaser.[240] Trusts are now a favorable conveying device because of tax[241] and confidentiality benefits.[242] No state statute expressly restricts the use of trusts to avoid alien land ownership prohibitions.[243]

Effective state disclosure laws would aid in determining the extent and type of alien investment in United States land, but few states have such laws.[244] Furthermore, disclosure statutes may face preemption by the recent federal disclosure act.[245]

B. Congressional Response

Congress responded to the uproar over foreign investment by enacting the Foreign Investment Study Act of 1974,[246] the International Investment Survey Act of 1976,[247] and the Agricultural Foreign Investment Disclosure Act of 1978.[248] The Foreign Investment Disclosure Act

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[237] F. MORRISON & K. KRAUSE, *supra* note 27, at 35.

[238] For example, in 1956 a special session of the South Carolina legislature increased the maximum amount of land an alien might hold in the state from 500 to 500,000 acres. 1956 S.C. Acts 2971 (codified at S.C. CODE § 27-13-30 (1976)). The reported reason for the increase was to allow an English corporation to build a pulp mill in the state. Wall St. J., May 31, 1956, at 7, col. 1.

[239] F. MORRISON & K. KRAUSE, *supra* note 27, at 35.

[240] *Id.*

[241] *See* Warren, *Personal Trusts for Non-Resident Aliens*, 115 TRS. & ESTS. 660, 661-64 (Oct. 1976) (taxation of alien trusts).

[242] *Id.* at 661.

[243] *See* notes 71 through 75 *supra*.

[244] *E.g.*, IOWA CODE ANN. §§ 172 c.1 - 172 c.15 (West Supp. 1981); NEB. REV. STAT. §§ 76-1501, -1506 (1976); ILL. REV. STAT. ch. 5, §§ 601-608 (West Supp. 1981).

[245] 12 VAND. J. TRANSNAT'L L. 665, 682 (1979). Statutes that impose large penalties for failure to disclose have a deterrent effect on foreign investment and would be more likely to intrude upon the foreign relations power of the federal government. *Id.* at 683-86.

[246] Pub. L. No. 93-479, 88 Stat. 1450 (codified at 15 U.S.C. § 78b (1976 & Supp. III 1979)).

[247] Pub. L. No. 94-472, 90 Stat. 2059 (codified at 22 U.S.C. §§ 3101-3108 (1976 & Supp. III 1979)).

[248] Pub. L. No. 95-460, 92 Stat. 1263 (codified at 7 U.S.C. §§ 3501-3508 (Supp. III 1979)).

provides for detailed reporting of foreign investment in agricultural land.[249] Under the Act, a foreign purchaser is required to file a report with the Agricultural Stabilization and Conservation Service office in the county where the land is located.[250]

Statistics from the Act may be distorted due to several deficiencies in the requirements. First, no requirement exists for filing an update. Second, a report does not have to be filed when the land is changed from agricultural to nonagricultural use. Third, the amount of foreign ownership as a second tier interest in a United States corporation may fluctuate, but the obligation to file attaches at the time of purchase. Therefore, the foreign interest may drop below the required five percent between the acquisition and filing, and yet the name of the foreigner will appear in the report.[251]

C. *State Systems*

Problems in obtaining accurate information on foreign investment also arise in the state system of recording land transactions.[252] Since land purchases are diverse and are usually smaller investments than the acquisition of an industrial company, they receive less public scrutiny by the press. In addition, land records kept by county officials do not always identify the actual owner. The disorganization in state re-

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[249] The Act applies only to agricultural land, which is defined as "any land located in one or more States and used for agricultural, forestry, or timber production purposes [as defined further in] regulations to be prescribed by the Secretary [of Agriculture]." 7 U.S.C. § 3508(1) (Supp. III 1979).

[250] 7 C.F.R. §§ 781.1 through .5 (1981). The regulations became effective February 2, 1979. *Id.* § 781.3(a). All foreign persons holding agricultural land as of February 1, 1979, has until August 1, 1979 to file a report with the Secretary of Agriculture. *Id.* § 781.3(b). Acquisition or dispositions after February 2, 1979, must be reported within 90 days of the transfer. *Id.* § 781.3(c).

The Act defines "foreign person" as any individual who is not lawfully admitted to the United States for permanent residence. 7 U.S.C. § 3508.3 (Supp. III 1979). The Act requires all United States entities which have a "significant interest or substantial control . . . directly or indirectly held" by a foreign person to file a report. *Id.* § 3508(c)(ii). The requirement of "significant interest or substantial control" has been construed as five percent or more foreign ownership. REP. No. 447, *supra* note 32, at 2. The Act exempts reporting of security interests. 7 U.S.C. § 3501(a) (Supp. III 1979).

Only civil penalties are provided for noncompliance with the provisions of the Act. When a foreign person fails to file or falsely files, the Secretary of Agriculture determines the penalty, up to the maximum of 25% of the fair market value of the property interest on the date of the assessment of the penalty. *Id.* § 3502.

[251] Zedalis, *Disclosure of Foreign Investment in U.S. Agricultural Land*, 31 MERCER L. REV. 711, 724 (1980).

[252] MONITORING, *supra* note 18, at 27-28.

cording leaves the state with insufficient information about the amounts, prices, and types of nonresident alien investments. Without such knowledge, the state is dependent upon the Agricultural Foreign Investment Disclosure Act statistics, which are not comprehensive.[253]

VI. A More Reasonable Approach

Foreign investment presents a viable and safe method of stimulating Mississippi's economy. While the other Sun Belt states have welcomed foreign capital,[254] Mississippi has adhered to an antiquated protectionist attitude. When the issue of foreign ownership is not approached at an emotional level,[255] the advantages of foreign capital may be analyzed. Foreign-owned land not only tends to remain under the same American management,[256] but often is more productive after the change of ownership.[257] In addition, the foreigner pays taxes to the municipal fund without receiving many of the benefits.[258]

State laws regarding alien investment have constitutional as well as mechanical problems. The equal protection clause of the fourteenth amendment has long protected resident aliens.[259] As nonresident aliens gain property rights within the various states, one may argue for an extension of equal protection to such foreign investors.[260] Even without constitutional problems, the state statutes are often ineffective because of the use of corporations and trusts to bypass state laws.[261]

Since the present Mississippi law is a total prohibition of nonresident alien ownership, it exacerbates the problem of disguised investments. Furthermore, past state efforts to encourage foreign investment have been totally inconsistent with the state laws.[262] In order to evaluate the importance of foreign capital, the myths surrounding foreign investment must be replaced with an accurate monitoring system. Monitoring foreign purchases will dispel the xenophobic overreaction

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[253] *See* Zedalis, *supra* note 251, at 723-25 (data collected fails to depict extent of foreign land investment).

[254] *See* note 27 and accompanying text *supra*.

[255] *See* note 3 and accompanying text *supra*.

[256] *See* REP. No. 447, *supra* note 32, at 26. The report indicated that foreign investors have changed operators in only about one-fourth of recent aquisitions of land. *See* notes 40, 41 and accompanying text *supra*.

[257] *See* note 42 and accompanying text *supra*.

[258] *See* note 46 and accompanying text *supra*.

[259] *See* notes 84 through 92 and accompanying text *supra*.

[260] *See* notes 104, 105 and accompanying text *supra*.

[261] *See* notes 230 through 243 and accompanying text *supra*.

[262] *See* notes 227 through 229 and accompanying text *supra*.

which thwarts Mississippi's economic growth and disables acceptance of foreign capital as a necessary component in modern state economic policy.

Ann S. Woodliff

RECENT DECISIONS

Worker's Compensation—Section 9(i)—Compromise Settlement Subject to Review for Changed Condition or Mistake in Determination of Fact

Claimant[1] filed a letter with the Mississippi Workmen's Compensation Commission requesting that a compromise settlement, effected under section 9(i)[2] of the Workmen's Compensation Law,[3] be reopened for further consideration. Claimant alleged that, at the time of the settlement, he was misinformed of his medical diagnosis and that this was sufficient basis for reopening.[4] Defendants moved to dismiss, contend-

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[1] George Mason, a 38 year old illiterate from Harrison County, sustained a back injury while employed as a truck driver. The injury, which resulted in considerable permanent partial disability and medical treatment, was compensable under the employer's workers' compensation insurance. The employer's insurance carrier negotiated with claimant a $6,500 compromise settlement which was approved by the Workmen's Compensation Commission pursuant to section 9(i) of the Workmen's Compensation Law. *See* note 2 *infra*. Within a year after payment of the lump sum compromise, the claimant sought to reopen the case. The claimant's employer, Bailey Lumber Company, and the employer's insurance carrier, the Continental Insurance Company, were made defendants. Bailey Lumber Co. v. Mason, 401 So. 2d 696, 696-97 (Miss. 1981).

[2] Section 9(i) provides:

> Rules of the commission shall govern compromise payments where the prescribed schedules are not applicable and which, in its discretion, may be made in cases where it is not possible to determine the exact extent of disability, as for example in certain injuries to the back or head . . . . Commutation and lump sum settlement payments shall be governed by rules of the commission, and shall not be made except when determined to be in the best interest of the injured worker or his dependents, the commission having final authority in such questions.

Miss. Code Ann. § 71-3-29 (1972).

[3] *Id.* §§ 71-3-1 to -111 (1972 & Supp. 1981).

[4] 401 So. 2d at 697. Claimant had been under the care of two local physicians, who both had submitted final medical reports to the insurance claims adjustor and the Commission prior to the settlement. These reports stated that the claimant was totally disabled. Neither the adjustor, the attorney for the insurance carrier, nor the administrative assistant at the Commission office, all of whom claimant had talked with during the settlement procedure, disclosed these findings to him. The settlement was evaluated and explained to the claimant on the basis of a 12½% permanent partial disability rating

ing that a compromise settlement could be reopened only upon a showing of fraud.[5] The administrative judge ordered that the case be reopened,[6] concluding that the compromise settlement and the Commission's approval thereof were based on misrepresentations of fact which allowed the carrier to overreach and to take unfair advantage of the claimant.[7] This order was appealed to the full Commission and was reversed.[8] The Commission's decision was reversed on appeal[9] to the

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made by a third doctor to whom the adjustor had sent the claimant. The claimant accepted a lump sum compromise settlement based on the 12½% permanent partial disability rating, believing that this was the maximum he could obtain. *Id.* at 696-701.

[5] *Id.* at 707. The defendants based this contention on the court's ruling in Dixon v. Green, 240 Miss. 204, 127 So. 2d 662 (1961). 401 So. 2d at 707; *see* notes 48 through 53 and accompanying text *infra*.

[6] 401 So. 2d at 701.

[7] *Id.* The administrative judge based his decision on the following findings: (1) the claimant was of a low intelligence level and deeply in debt; (2) the experienced adjustor had possession of the attending physicians' medical reports which stated total disability, but had based the settlement amount offered on the 12½% permanent partial disability figure reported by the doctor to whom the adjustor had sent the claimant; (3) the adjustor and the insurance carrier's attorney failed to disclose to claimant the reports of total disability or to explain to him that such reports could entitle him to increased benefits; (4) the petition for compromise settlement prepared by the carrier's attorney failed to set forth the total disability reports of the claimant's attending physicians, and incorrectly stated that the claimant had been released to return to work and had suffered no loss of wage-earning capacity; (5) the interview with the Commission prior to approval of the 9(i) settlement to advise claimant of his rights under the Law did not satisfy its purpose because it was carried out by an inexperienced assistant who failed to explain that reports of total disability had been submitted or that such reports might entitle claimant to more money; (6) the full Commission erred in its determination that the settlement was in the claimant's best interest because of inaccuracies in the petition for settlement and the fact that such inaccuracies were not corrected by the recommendation submitted to the Commission by the administrative assistant; and (7) the claimant had accepted $6,500 as a final lump sum settlement under the mistaken belief that this was the maximum he was entitled to receive. *Id.* at 700-01.

[8] *Id.* at 701-02. The Commission noted that there was no corroborating evidence that the claimant did not know of the total disability report. Furthermore, the Commission found that the claimant's testimony that he did not understand the effect of the settlement was directly refuted by the testimony of the adjustor, the insurance carrier's attorney, and the Commission's representative. The Commission, finding that the claimant understood the effect of the settlement, concluded that in light of Dixon v. Green, 240 Miss. 204, 127 So. 2d 662 (1961), the reopening of the settlement was not in order because there was no showing of fraud or unfair advantage. 401 So. 2d at 701-02; *see* notes 48 through 53 and accompanying text *infra*.

[9] 401 So. 2d at 697. The Workmen's Compensation Law provides that the circuit court of the county in which the injury occurred may review a final Commission compensation award. To effect an appeal, a notice of appeal must be filed with the Commission within 30 days from the date when the award was filed in the Commission's office. MISS.

Circuit Court of Harrison County.[10] On appeal to the Mississippi Supreme Court, *held*, affirmed.[11] A compromise settlement pursuant to section 9(i) may be reopened under section 21[12] upon a showing of a change in condition or a mistake in determination of fact, including a mistake of fact by the Commission that a compromise settlement is in the best interest of claimant. *Bailey Lumber Co. v. Mason*, 401 So. 2d 696 (Miss. 1981).

Workers' compensation, a relatively new field of law,[13] evolved as an expression of the modern social concept that the liability of the employer for work-related accidents should be based on the accident's relation to the job, rather than on the negligence of the employer.[14] The concept was meant to remedy the harshness of the common law requirement that the injured employee prove employer negligence in or-

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CODE ANN. § 71-3-51 (1972).

[10] 401 So. 2d at 702. The court reasoned that the Commission's factual finding that the claimant understood the settlement and voluntarily decided to abandon the total disability claim was error in light of the inference drawn from the facts concerning the settlement. *See* note 7 *supra*. "The court finds it hard to believe that one properly informed would compromise for less than he is obviously entitled. It is clearly revealed by the record that this is what the Claimant did." 401 So. 2d at 702. Furthermore, the court concluded that the legal finding of the Commission that Dixon v. Green, 240 Miss. 204, 126 So. 2d 662 (1961) precluded a reopening of a compromise settlement absent a showing of fraud or unfair advantage was incorrect. The court based this conclusion on the fact that the *Dixon* court did not reach the question of reopening pursuant to section 21 of the Law. *See* note 12 *infra*. The court found that since there was no distinction drawn in section 21 over what types of claims could be petitioned for reopening under the one-year continuing jurisdiction of the statute, then compromise settlements could be reopened if there was the requisite showing of change in condition or a mistake in determination of fact. The court reasoned that the Commission's conclusion that the settlement was in the best interest of the claimant constituted a mistake in determination of fact which would allow the compromise settlement to be reopened under section 21. 401 So. 2d at 702-05.

[11] 401 So. 2d at 708. The court remanded the case to the Commission for further proceedings. *Id.*

[12] Section 21 provides:

> Upon its own initiative or upon the application of any party in interest on the ground of a change in conditions or because of a mistake in a determination of fact, the commission may, at any time prior to one (1) year after date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one (1) year after the rejection of a claim, review a compensation case, issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. . . .

MISS. CODE ANN. § 71-3-53 (1972).

[13] *See* 1 A. LARSON, WORKMEN'S COMPENSATION LAW §§ 5.00, .10 (1978).

[14] S. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 5 (1944).

this system, the employer immediately begins payment according to the statutory schedules and reports such payments to the administrative body.[31]

Contested claims[32] normally are handled with an informal hearing by the administrative body which determines the disputed matters and then makes an award of compensation.[33] In a number of states, however, contested claims are allowed by statute to be resolved by compromise settlement between the parties, subject usually to approval by the administrative body.[34] In the absence of statutory authority for compromise settlement of contested claims, most decisions have held that there can be no compromise of compensation rights for less than the statutory amount,[35] but a few decisions have held that a contested

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[31] *Id.* The employer reports directly to the administrative body both upon beginning and terminating payments. *Id.*

[32] A claim is contested if there is a dispute as to the employee's right to compensation benefits or the amount of benefits. W. DODD, *supra* note 25, at 117.

[33] W. MALONE, M. PLANT & J. LITTLE, *supra* note 18, at 405.

[34] *See, e.g.*, ALA. CODE § 25-5-56 (1975) (settlement may be made for less than the article stipulates if it is in the best interest of the parties and is approved by a judge of the circuit court of the county); ARK. STAT. ANN. § 81-1319(k)(2) (1976) (petition for final settlement will be approved upon the Commission's determination that it is in the employee's best interest); CAL. LABOR CODE §§ 5000-5002 (West 1971) (parties have the right, subject to board approval, to compromise any liability claimed to exist on account of injury or death); GA. CODE ANN. § 114-106 (Supp. 1981) (compromise settlement may be made in cases of conflicting evidence and, upon approval by board, shall be the complete and final disposition of the claim, with no right by board to review); HAWAII REV. STAT. § 386-78 (1976) (parties have the right, subject to board approval, to compromise a claim for compensation); ILL. ANN. STAT. ch. 48, § 138.23 (Smith-Hurd Supp. 1981-1982) (same); LA. REV. STAT. ANN. § 23.1271 (West Supp. 1981) (if dispute concerns liability or coverage, parties have right to compromise, subject to approval by county district court judge); MD. ANN. CODE art. 101, § 52 (Supp. 1980) (parties have the right to compromise upon such terms as Commission deems proper and, upon approval, no future proceedings will be allowed unless Commission specifically orders otherwise); MINN. STAT. ANN. § 176.521 (West Supp. 1980) (parties have the right, subject to board approval, to settle any claim); MO. ANN. STAT. § 287.390 (Vernon Supp. 1981) (compromise settlement approved by administrative law judge or Commission will bar all subsequent claims, except disputes as to extent of disability or rate of compensation); TEX. REV. CIV. STAT. ANN. art. 8307, § 12 (1967) (board may approve any compromise or settlement where liability or extent of the injury is uncertain); WIS. STAT. ANN. § 102.16 (West 1973) (parties may settle any controversy concerning compensation, and board, upon review, may set aside, modify, or confirm within one year of filing). *But see* N.Y. WORK. COMP. LAW § 33 (McKinney Supp. 1981) (statute specifically prohibits waiver or compromise of compensation by agreement of the parties).

[35] W. MALONE, M. PLANT & J. LITTLE, *supra* note 18, at 413; *see, e.g.*, Green v. Workmen's Compensation Appeal Bd., 43 Pa. Commw. Ct. 143, 401 A.2d 1243, 1245 (1979) (settlement not in line with the statutory provisions for lump sum commutation is

claim for compensation may be compromised like any other claim.[36] Mississippi's statutory provisions[37] allow compromise settlement, but only in very limited circumstances.[38]

Although compromise settlements are designed to provide a final disposition of contested claims, such settlements have been subject to review and reopening in certain circumstances.[39] Reopening is dependent upon the statutes and decisions of the particular jurisdiction involved[40] because each state's scheme for reopening is unique.[41] Some states that allow compromise settlements of contested claims specify by statute under what circumstances a settlement may be reopened by the administrative body,[42] while other states, by statute, merely give the administrative body the right to reopen.[43] When there is no specific

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void since contrary to intent of the Act); Southern v. Department of Labor and Indus., 39 Wash. 2d 475, 236 P.2d 548, 550-51 (1951) (compromise of benefits for total and permanent disability held void).

[36] W. MALONE, M. PLANT & J. LITTLE, *supra* note 18, at 413-14; *see, e.g.*, Employers' Mut. Liab. Ins. Co. v. Industrial Comm'n, 121 Ariz. 558, 592 P.2d 392, 395 (Ct. App. 1979) (if Commission determines that settlement was entered into fairly, then compromise settlement does not have to mirror statutory compensation provisions); Dotson v. Proctor & Gamble Mfg. Co., 102 Kan. 248, 169 P. 1136, 1137-38 (1918) (court refused to set aside settlement agreement in the absence of fraud).

[37] MISS. CODE ANN. § 73-3-29 (1972).

[38] *See* note 2 *supra*. Compromise settlements are allowed by the Commission only in cases where the prescribed schedules are not applicable, it is not possible to determine the extent of disability involved, and it is deemed to be in the best interest of the employee. Such settlements are initially negotiated by the parties and submitted to the Commission for approval by petition of the claimant. V. DUNN, MISSISSIPPI'S WORKMEN'S COMPENSATION § 391 (2d ed. 1967). All compromise settlements are considered by the Commission on specified days of each week. It is the general procedure for the Commission to interview the claimant to any proposed settlement to determine that the claimant understands the settlement and that it is in his best interest. *Id.* § 389. This interview is required for claimants who are not represented by counsel. MISS. WORKMEN'S COMP. LAW PROC. R. 15 (1965).

[39] *See* notes 42 through 46 and accompanying text *infra*.

[40] Annot., 165 A.L.R. 9, 36 (1946).

[41] Note, *Workmen's Compensation—Reopening in Tennessee*, 7 MEM. ST. U.L. REV. 261, 263 (1977).

[42] *See, e.g.*, ALA. CODE § 25-5-56 (1975) (settlement can be vacated for fraud, undue influence, or coercion upon application of party to the approving judge within six months of the date of settlement); LA. REV. STAT. ANN. § 23.1273 (West 1964) (settlement shall not be set aside except for fraud or misrepresentation).

[43] *See, e.g.*, HAWAII REV. STAT. § 386-78 (1976) (compromise settlement approved by board shall not prejudice claimant's right to reopen case); MD. ANN. CODE art. 101, § 52 (Supp. 1980) (upon approval of compromise settlement, no future proceeding will be allowed unless Commission specifically orders otherwise); MINN. STAT. ANN. § 176.521 (West Supp. 1981) (worker's compensation court of appeals may set aside settlement

statutory provision for reopening a compromise settlement, the decisions in some jurisdictions have allowed the reopening by resort to the general review statute of the particular state's act.[44] Without reference to the general review statute, other decisions have allowed reopening by the administrative body, but only upon limited grounds such as fraud, change in condition, or insanity.[45] Still other courts have held that an approved compromise settlement is a jurisdictional bar to the administrative body's right to review, and have referred the claimant to the courts for relief.[46] Mississippi's law, in section 21,[47] provides for general review, but does not provide specifically for reopening of a compromise settlement.

In the case of *Dixon v. Green*,[48] the Mississippi Supreme Court

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pursuant to this chapter); WIS. STAT. ANN. § 102.16 (West 1973) (board can set aside or modify compromise settlement within one year after approval).

[44] *See, e.g.*, Hohn v. Alaska Indus. Bd., 150 F. Supp. 519, 521-22 (D. Alaska 1957) (general review statute gives board authority to set aside compromise when based upon fraud or mistake); Silva v. Industrial Comm'n, 68 Cal. App. 510, 229 P. 870, 871-72 (1924) (general review provision gives board authority to review compromise settlement approval orders, but only upon showing of fraud, mistake, duress, or undue influence); Ahler v. Sears Roebuck & Co., 54 Ill. App. 3d 638, 369 N.E.2d 1306, 1309 (1977) (in fixing jurisdiction of Commission to review settlement, approved settlement is, in legal effect, an award), *aff'd*, 73 Ill. 2d 638, 383 N.E.2d 207 (1978); Wollschlager v. Standard Constr. Co., 300 Minn. 550, 220 N.W.2d 346, 346 (1974) (as in any award, Commission has authority to set aside approved settlement upon showing of fraud, mistake, newly discovered evidence, or substantial change in condition). *But see* Commercial Cas. Ins. v. Hilton, 126 Tex. 497, 87 S.W.2d 1081, 1082-83 (1935) (since compromise settlement is not an award of compensation, board has no review jurisdiction under the review statute governing awards).

[45] *See, e.g.*, Cook v. Brown, 246 Ark. 11, 436 S.W.2d 482, 483 (1969) (since statute provides that settlement is final, Commission has no review jurisdiction without showing of fraud or insanity); National Union Ins. Co. v. Mills, 99 Ga. App. 697, 109 S.E.2d 830, 831 (1959) (approved settlement is not subject to board review absent change in condition or fraud in procurement).

[46] *See, e.g.*, Mosier v. St. Joseph Lead Co., 205 S.W.2d 227, 232 (Mo. Ct. App. 1947) (approval of compromise settlement exhausted jurisdiction of Commission and claimant's only relief was by suit in equity court upon grounds of fraud or mistake); Luersen v. Transamerica Ins. Co., 550 S.W.2d 171, 173 (Tex. Civ. App. 1977) (board has no authority to set aside approved compromise settlement, but court has jurisdiction to set aside on grounds of fraud or mistake).

[47] MISS. CODE ANN. § 71-3-53 (1972); *see* note 12 *supra*.

[48] 240 Miss. 204, 127 So. 2d 662 (1961). Claimant had suffered a subarachnoid hemmorhage while moving concrete culvert pipes for Green. After negotiations between the employee and the employer's insurance carrier, a petition for a lump sum compromise settlement of $1,000 was submitted to the Commission. The petition set out the facts and the doubtful causal connection of the claim. The Commission approved the settlement and the claimant subsequently sought to set aside the approval order and to re-

was confronted for the first time with the question whether a compromise settlement, under section 9(i),[49] could be reopened under section 21[50] of the Mississippi law. In *Dixon,* the court denied the claimant's petition to reopen because there was no evidence of fraud or unfair advantage, and because the claimant fully understood the questionable nature of his claim and the final effect of the compromise settlement.[51] The court concluded that section 21 of the Law,[52] authorizing reopening of compensation cases for changed condition or mistake in a fact determination, did not apply, but declined to decide the question whether this section could be utilized under different circumstances to reopen a compromise settlement.[53] One year later, in *Armstrong Tire & Rubber Co. v. Franks,*[54] the court approved the reopening of a section 13(j) lump sum award[55] under section 21.[56] The court, however, noting that the *Dixon* court had pretermitted the question whether section 21 would apply to a 9(i) settlement, found that such was not in issue and left the question unanswered.[57]

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open his claim for further compensation and redetermination of his liability. *Id.* at 207-08, 127 So. 2d at 663.

[49] MISS. CODE ANN. § 71-3-29 (1972); *see* note 2 *supra.*

[50] MISS. CODE ANN. § 71-3-53 (1972); *see* note 12 *supra.*

[51] 240 Miss. at 208-09, 127 So. 2d at 664. A leading authority on Mississippi's Workmen's Compensation Laws has interpreted *Dixon's* effect on the reopening of compromise settlements to be the following: "[I]t has been intimated, although not expressly decided, that the compromise settlement may not be reviewed or vacated, at least in the absence of a showing of fraud upon or the taking of an unfair advantage of the claimant in connection therewith." V. DUNN, *supra* note 38, § 339 (citing Dixon v. Green, 240 Miss. 204, 127 So. 2d 662 (1961)).

[52] MISS. CODE ANN. § 71-3-53 (1972); *see* note 12 *supra.*

[53] 240 Miss. at 209, 127 So. 2d at 664.

[54] 242 Miss. 792, 137 So. 2d 141 (1962). The claimant suffered a work-related arm injury for which he was to be paid temporary total disability benefits for 60 weeks. A lump sum payment, whereby the claimant is paid the present value of future payments, was agreed upon between the parties and approved by the Commission. This lump sum was based on a 50% disability rating. Subsequently, the claimant filed to reopen under section 21, alleging that there had been a mistake in a determination of fact because he had 100% disability of his arm. *Id.* at 796-99, 137 So. 2d at 142-44.

[55] Section 13(j) provides:

> Whenever the commission determines that it is for the best interests of a person entitled to compensation, the liability of the employer for compensation, or any part thereof as determined by the commission, may be discharged by the payment of a lump sum equal to the present value of future compensation payments commuted, computed at four per centum (4%) true discount compounded annually. . . .

MISS. CODE ANN. § 71-3-37(10) (1972).

[56] 242 Miss. at 801, 137 So. 2d at 145.

[57] *Id.* at 803, 137 So. 2d at 146.

In the instant case, the court reasoned that since the application of section 21[58] to a section 9(i)[59] compromise settlement was not addressed by the court in *Dixon v. Green*, the question was left open for future determination.[60] The court further reasoned that since section 21 made no distinction between compromise settlements and lump sum awards, and since lump sum awards had been allowed to be reopened under section 21,[61] then compromise settlements could be reopened under section 21.[62] The court found that since the settlement was not sufficiently analyzed by the Commission and since the Commission was not given facts that would have shown that unfair advantage had been taken of the claimant,[63] then the Commission made a mistake in its determination of fact that the settlement was in the claimant's best interest.[64] The court therefore concluded that since section 21 permits the Commission to review a case, because of a mistake in determination of fact, within one year from the date of the last payment, then the petition in this instance met these requirements and should have been reopened by the Commission.[65]

In dissent, Justice Robertson, joined by three other justices,[66] reasoned that since the court has stated that the Commission is the fact finder and that its decisions would not be disturbed if supported by substantial evidence,[67] then the present decision of the Commission should not have been overturned by the circuit court because it was supported by overwhelming evidence.[68]

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[58] MISS. CODE ANN. § 71-3-53 (1972); *see* note 12 *supra*.

[59] MISS. CODE ANN. § 71-3-29 (1972); *see* note 2 *supra*.

[60] Bailey Lumber Co. v. Mason, 401 So. 2d 696, 705-06 (Miss. 1981) (quoting Dixon v. Green, 240 Miss. 204, 209, 127 So. 2d 662, 664 (1961) and Armstrong Tire & Rubber Co. v. Franks, 242 Miss. 792, 803, 137 So. 2d 141, 146 (1962)).

[61] *See* notes 54 through 57 and accompanying text *supra*.

[62] 401 So. 2d at 704, 707. At this point in its analysis, the court stated the reasoning of the circuit court and, by implication, adopted the lower court's rationale by finding no error in its decision.

[63] *Id.* at 708; *see* note 7 *supra*.

[64] 401 So. 2d at 707. The lower court had based its conclusion on a statement made in 3 A. LARSON, *supra* note 28, § 81.52 (1976) that a mistake in determination of fact, under statutes which utilize this ground for review, includes a mistake on the part of the finder of fact. 401 So. 2d at 704. Because the court found no error in the lower court's decision, it should follow that the court agreed with this conclusion.

[65] 401 So. 2d at 707-08.

[66] Justices Smith, Walker, and Broom joined in the dissent. *Id.* at 716.

[67] *Id.* at 715 (quoting Roberts v. Junior Food Mart, 308 So. 2d 232, 234 (Miss. 1972) and citing Shippers Express v. Chapman, 364 So. 2d 1097 (Miss. 1978)).

[68] 401 So. 2d at 715-16. The dissenters extensively recited the opinion of the Commission, impliedly adopting its rationale. *See* note 8 *supra*. Furthermore, the dissent

The instant case will have the immediate effect of ending any uncertainty over whether an approved compromise settlement may be reopened by the Commission pursuant to section 21. Until this decision, it was assumed that a compromise settlement could not be reopened absent a showing of fraud or unfair advantage.[69] The court's decision, however, effectively extends, through section 21, the Commission's power to reopen compromise settlements where there is a change in condition or a mistake in a determination of fact.[70]

The instant case is distinguishable factually from *Dixon v. Green*.[71] In *Dixon*, the claimant was informed of and understood the full extent of his injury,[72] while in the instant case the claimant was misinformed about the extent of his disability.[73] The court in the instant case, therefore, was able to grant relief under section 21 by holding that the Commission's approval was a mistake in determination of fact.[74] The mistake was that the compromise settlement was not in the best interest of the claimant since he was misinformed as to his injury.[75] The court's classification of this misinformation as a mistake in determination of fact is in accord with decisions of other states having similar statutory provisions.[76] Also, the court's use of the general review statute to reopen the compromise settlement is not novel, but is in line with some other jurisdictions.[77] It does appear, however, that the court's decision is consistent with the historic liberality of construction given to the Mississippi law by the court.[78] Decisions of another group of similarly situated jurisdictions have held that the general review statutes are not applicable and that reopening will be

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noted that the uncorroborated testimony that claimant did not understand the settlement's effect was self-serving and refuted by other witnesses. The dissent found that the claimant's evidence was further weakened by the fact that he had signed and acknowledged a number of forms necessary for the completion of the settlement, all of which stated in some manner that the settlement would be the final disposition of his claim. The dissent, therefore, concluded, based on the foregoing facts, that the decision of the Commission was supported by overwhelming evidence and should have been reinstated. *Id.* at 710-16.

[69] *See* note 51 *supra*.

[70] *See* note 12 *supra*.

[71] *See* notes 48 through 53 and accompanying text *supra*.

[72] *See* notes 48 through 53 and accompanying text *supra*.

[73] *See* note 7 *supra*.

[74] *See* note 64 and accompanying text *supra*.

[75] *See* note 64 and accompanying text *supra*.

[76] *See* note 64 *supra*.

[77] *See* note 44 and accompanying text *supra*.

[78] *See* note 21 and accompanying text *supra*.

allowed only upon such limited grounds as fraud or mistake.[79]

The dissenters, on the other hand, would not have allowed reopening because the claimant knowingly had signed forms stating that the compromise was the final disposition of his claim.[80] The fallacy in the minority's logic lies in its failure to recognize from the facts that the claimant had not been fully informed of all circumstances when he signed such settlement forms. The majority, recognizing that the claimant had not been adequately informed, reached the more equitable result which protected the welfare of the claimant.

Because this equitable decision will, however, subject compromise settlements to reopening for changed condition or mistaken fact determination, where such settlements were previously thought to be the final disposition of the claim, it is likely to have a profound effect on the administrative procedures required for obtaining a compromise settlement. In the instant case, the mistake in determination of fact was due in part to inaccuracies in the petition for settlement.[81] It would appear, therefore, that the Commission should prescribe a standard form or format that would help assure that all pertinent facts and medical data are included. Furthermore, even though the administrative rules presently require that the Commission interview a claimant when he is not represented by counsel,[82] the Commission may wish to take measures to further tighten the interview requirements or to adhere more closely to the present requirements so as to promote full disclosure to the claimant of his rights and of the pertinent facts. Finally, because such settlement could be subject to reopening for an error in approval, the Commission, if not amply convinced that all the facts are before it or that the settlement is in the claimant's best interest, may be more likely to reject the petition and to require an informal hearing to determine the disputed matters and to make an award.

These additional requirements and increased scrutiny by the Commission would most likely increase the burden on the employer's insurance carrier in procuring a valid compromise settlement. On the other hand, the stricter standards should help assure that the claimant receives the full benefits of the Law.

Gina M. Jacobs

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[79] *See* note 45 and accompanying text *supra*.
[80] *See* note 68 *supra*.
[81] *See* note 7 *supra*.
[82] *See* note 38 *supra*.

Constitutional Law—Discriminatory Vote Dilution—Purposeful Discrimination may be inferred from the Totality of the Circumstances

Plaintiffs[1] initiated a class action[2] alleging that a system of at-large elections[3] was maintained in Burke County, Georgia,[4] for the purpose of diluting the significance of the votes of the class[5] in violation of the first,[6] fourteenth,[7] and fifteenth amendments,[8] as well as section 2 of the Voting Rights Act of 1965.[9] Plaintiffs sought to have this system

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[1] Plaintiffs were representatives of all black residents of Burke County, Georgia. Lodge v. Buxton, 639 F.2d 1358, 1361 (5th Cir.), *cert. granted sub nom.* Rogers v. Lodge, 50 U.S.L.W. 3212 (1981).

[2] Under rule 23 of the Federal Rules of Civil Procedure, a plaintiff is permitted to file suit on behalf of himself and other members of a defined class. Prerequisites of a class action include: (1) the members of a class being so numerous as to make joinder impracticable; (2) questions of law or fact common to the class; (3) claims or defenses of the representative party that are typical of the claims or defenses of the class; and (4) fair and adequate protection of the interests of the class by the representative parties. Fed. R. Civ. P. 23(a). *See generally* J. Moore, A. Vestal & P. Kurland, 1 Moore's Manual, Federal Practice and Procedure § 14.07[1] (1962).

[3] An at-large election system is one in which the entire governmental unit functions as an electoral district. Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation,* 1976 Ariz. St. L.J. 277, 280 n.19. The election scheme in dispute concerned the at-large election of county commissioners. 639 F.2d at 1375. This note will use the terms "at-large district" and "multi-member district" interchangeably.

[4] 639 F.2d at 1361. Burke County, Georgia, is the second largest of Georgia's 159 counties in terms of area. A slight majority of the county's population of over 10,000 is black. The county is predominantly rural and its economic base is primarily agricultural. *Id.*

[5] *Id.*

[6] U.S. Const. amend. I. The court did not reach the plaintiffs' first amendment claim. 639 F.2d at 1364 n.11.

[7] U.S. Const. amend. XIV, § 1 declares that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[8] "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.

[9] 42 U.S.C. § 1973 (Supp. III 1979). The court held this claim was not applicable to voting dilution cases. 639 F.2d at 1364 n.11. The plaintiffs also contended that the election scheme in question was in violation of 42 U.S.C. § 1971 (Supp. III 1979). The court, however, expressed no opinion on the applicability of this statute to the present case. 639 F.2d at 1364 n.11.

replaced with a single-member district election scheme.[10] Defendants contended that the proof was insufficient to establish the required discriminatory intent.[11] The district court[12] found for the plaintiffs and entered an order requiring the county to implement the plaintiffs' proposed election scheme.[13] On appeal, the Court of Appeals for the Fifth Circuit, *held*, affirmed. An independent inquiry into the totality of the circumstances may be sufficient to give rise to an inference that an at-large election scheme is being maintained for a discriminatory purpose. *Lodge v. Buxton*, 639 F.2d 1358 (5th Cir.), *cert. granted sub nom. Rogers v. Lodge*, 50 U.S.L.W. 3212 (1981).

The concept of representative government requires that each citizen have an equally effective voice in the election of representatives.[14] Thus, an election system that serves to dilute the strength of a person's

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[10] Single-member districts are governmental units that elect one representative to the legislative body. Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation*, 120 U. PA. L. REV. 666, 670 n.23 (1972). Both plaintiffs and defendants submitted proposed election schemes to the court. 639 F.2d at 1381; *see* note 15 *infra*.

[11] 639 F.2d at 1362; *see* City of Mobile v. Bolden, 446 U.S. 55, 66 (1980) (at-large election schemes must be shown to be maintained for purpose of discriminatory vote dilution as prerequisite of constitutional invalidity).

[12] Plaintiffs instituted this action in the United States District Court for the Southern District of Georgia. 639 F.2d at 1360.

[13] The proposed scheme consisted of five single-member districts to be apportioned as follows:

District	Total Population	Black Population (%)	White Population (%)	% Deviation
1	3,736	2,899 (77.6)	837 (22.4)	+2.3
2	3,673	2,753 (74.9)	920 (25.1)	+0.5
3	3,595	1,914 (53.2)	1,681 (46.8)	−1.6
4	3,590	1,852 (51.6)	1,738 (48.4)	−1.7
5	3,661	1,570 (42.9)	2,091 (57.1)	+0.3

District	Voting Age Population	Black Voting Age Population (%)	White Voting Age Population (%)
1	2,048	1,482 (72.4)	556 (27.6)
2	2,029	1,407 (69.3)	622 (30.7)
3	2,115	978 (46.2)	1,137 (53.8)
4	2,112	947 (44.6)	1,175 (55.4)
5	2,217	803 (36.2)	1,414 (63.8)

Id. at 1361-62 n.4.

[14] Reynolds v. Sims, 377 U.S. 533, 565 (1964); *see* Gray v. Sanders, 372 U.S. 368, 381 (1963) (local governments cannot violate principle of one man, one vote).

vote may be held invalid.[15] The dilution of a vote may be accomplished in several ways. First, a governmental unit may apportion the boundaries of single-member districts in such a manner as to provide for the election of representatives by unequal numbers of voters.[16] A governmental unit may also apportion its boundaries in such a manner as to exclude certain classes of people[17] or submerge the votes of minority groups in multi-member or at-large districts.[18] Although multi-member districts are the traditional method of representation in both England and the United States,[19] this method has been the subject of much criticism.[20]

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[15] *See, e.g.*, Louisiana v. United States, 380 U.S. 145, 154-55 (1965) (invidious use of literacy tests violates fifteenth amendment); Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960) (racial gerrymandering gives rise to a cause of action under fifteenth amendment); Terry v. Adams, 345 U.S. 461, 470 (1953) (exclusion of blacks from party primaries is violative of fifteenth amendment); Guinn v. United States, 238 U.S. 347, 350 (1915) (Oklahoma's grandfather clause violative of fifteenth amendment).

[16] This is called quantitative dilution. The effect of this system is that the ballots cast by the voters are numerically unequal. *See* Note, *Discriminating Effect of Elections At-Large: The "Totality of Circumstances" Doctrine*, 41 ALB. L. REV. 363, 365-67 (1977) (discussing discriminatory effects of quantitative dilution); *cf.* Gaffney v. Cummings, 412 U.S. 735, 743 (1973) (states must apportion legislative districts with equal populations); Reynolds v. Sims, 377 U.S. 533, 568 (1964) (both houses of state legislatures must be apportioned on an equal population basis).

[17] This is commonly called a gerrymander. *See* Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (municipalities cannot draw boundaries to exclude black citizens). *See generally* Berry & Dye, *The Discriminatory Effects of At-Large Elections*, 7 FLA. ST. L. REV. 85, 86 (1979) (discussing history and effects of gerrymandering).

[18] This is called qualitative dilution. This type of district tends to subsume the votes of minorities within the votes of the majority, giving the minorities no effective voice in the election of representatives. *See* Note, *supra* note 16, at 367-73 (discriminatory effects of qualitative dilution).

[19] Multi-member districts have been used in the English and American political systems much longer than single-member districts. During the thirteenth century, each English shire, borough, or town elected two or three knights for shires, or burgesses for boroughs or towns, as representatives to Parliament. This system began as a solution to the problem of bandit-infested roads between the countryside and London. Two or three men afforded each other protection on the trips to and from Parliament. This English tradition is probably the reason why the London Company summoned two burgesses from each plantation to the opening of the Virginia House of Burgesses in 1619. Multi-member systems continued to be the dominant method of representation in the Colonies as well as under the new government. The first state to organize single-member districts was Vermont in 1785. Klain, *A New Look at the Constituencies: The Need for a Recount and a Reappraisal*, 49 AM. POL. SCI. REV. 1105, 1111-16 (1955).

[20] *See* Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 731-32 (1964) (multi-member districts require lengthy ballots and leave officials with no identifiable constituencies); Derfner, *Multi-Member Districts and Black Voters*, 2 BLACK L.J. 120, 127-28 (1972) (multi-member districts give voters less control over more representatives);

Claims of vote dilution, however, were not considered justiciable prior to the 1962 United States Supreme Court decision in *Baker v. Carr*.[21] The *Baker* Court rejected the theory that vote dilution claims rested upon the guaranty clause[22] and, therefore, were not justiciable because they involved political questions.[23] Instead, the Court held that a claim arising from the use of an election scheme that debased the votes of citizens through malapportionment was justiciable under the fourteenth amendment.[24]

Two years later, in *Reynolds v. Sims*,[25] the United States Supreme Court held that the fourteenth amendment guaranteed that electoral districts would be apportioned on an equal population basis on the theory that voters of districts with smaller populations had a greater voice in political elections than did voters in the more populated districts.[26] Although dealing with quantitative dilution,[27] *Reynolds* recognized the inherent problems with multi-member districts.[28] The *Reynolds* Court, however, did not consider multi-member districts to be unconstitutional per se.[29]

Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, 44 MISS. L.J. 391, 401 (1973) (at-large districts are a subtle form of racial gerrymandering); Comment, *Effective Representation and Multimember Districts*, 68 MICH. L. REV. 1577, 1588 (1970) (multi-member districts thwart representation of small interest groups). *See generally* Berry & Dye, *supra* note 17, at 85-88 (at-large election schemes in cities discriminate against black citizens); Engstrom, *supra* note 3, at 280 (same).

[21] 369 U.S. 186 (1962).

[22] U.S. CONST. art. IV, § 4. This section states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."

[23] The political question doctrine stems from the concept of separation of powers. This doctrine applies only to the relationship between the United States Supreme Court and the federal government. 369 U.S. at 210. It does not render a claim nonjusticiable simply because it touches matters of state government. *Id.* at 229.

[24] *Id.* at 237.

[25] 377 U.S. 533 (1964).

[26] *Id.* at 577.

[27] *Id.* This case involved Alabama's failure to reapportion the legislative districts within the state. The plaintiffs contended that the failure to reapportion these districts had resulted in grossly disproportionate representation. It was alleged that between the years 1900 and 1962 population growth had been uneven, and therefore, the weight of the vote in some counties had been diluted. *Id.* at 540.

[28] *Id.* at 579 n.58. The Court did not mention any specific objections to the use of multi-member jurisdictions, but did recognize that potential problems were inherent in their use. *Id.*

[29] *See id.* at 567-68. Population is the controlling criterion in legislative apportionment cases. *Id.* The Court held that the equal protection clause requires that the seats in both houses of a bicameral legislature be apportioned on a population basis. *Id.* at 567. Some deviations are constitutionally permissible so long as they are based on legitimate

In 1971, the United States Supreme Court, in *Whitcomb v. Chavis*,[30] articulated several standards that successful challengers to multi-member districts would have to meet. First, challengers had the burden of proving that multi-member districts actually served to dilute the voting strength of racial or political elements.[31] Second, the Court stated that a challenger must prove that multi-member districts were "conceived or operated as purposeful devices to further racial or economic discrimination."[32] Finally, the Court held that a lack of proportional representation would not suffice as an indicator of invidious discrimination absent a showing that black residents of the district had less opportunity to participate in the political process than did other residents of the district.[33]

The standards set forth in *Whitcomb* were satisfied two years later in *White v. Regester*.[34] *White* was the first case to successfully challenge a system of multi-member districts. The plaintiff challenged a Texas reapportionment plan containing several multi-member districts that allegedly discriminated against blacks and Mexican-Americans in violation of the fourteenth amendment.[35] The plaintiff successfully proved that Texas had a history of official racial discrimination[36] and

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considerations incident to the effectuation of a rational state policy. *Id.* at 564. In White v. Regester, 412 U.S. 755 (1973), the Court stated that "under our cases, multimember districts are not per se unconstitutional, nor are they necessarily unconstitutional when used in combination with single member districts." *Id.* at 765; *cf.* Chapman v. Meier, 420 U.S. 1, 18, 26-27 (1975) (indicating a preference for single-member districts); Connor v. Johnson, 402 U.S. 690, 692 (1971) (same).

[30] 403 U.S. 124 (1971).

[31] *Id.* at 144; *see* City of Mobile v. Bolden, 446 U.S. 55, 66 (1980) (plaintiff has burden of proof in vote dilution cases); White v. Regester, 412 U.S. 755, 766 (1973) (same).

[32] 403 U.S. at 149; *see* City of Mobile v. Bolden, 446 U.S. 55, 66 (1980) (plaintiff must demonstrate that election system is racially motivated); Nevett v. Sides, 571 F.2d 209, 217 (5th Cir. 1978) (same), *cert. denied*, 446 U.S. 951 (1980).

[33] 403 U.S. at 149; *see* City of Mobile v. Bolden, 446 U.S. 55, 68-69 (1980) (must show that process leading to nomination and election was not open equally to members of plaintiff's class); White v. Regester, 412 U.S. 755, 766 (1973) (same); Kirksey v. Board of Supervisors, 554 F.2d 139, 148 (5th Cir.) (same), *cert. denied*, 434 U.S. 968 (1977).

[34] 412 U.S. 755 (1973).

[35] *Id.* at 756.

[36] *Id.* at 766-67. The district court held that the past history of Texas was rife with official acts of discrimination. Graves v. Barnes, 343 F. Supp. 704, 725 (W.D. Tex. 1972), *rev'd sub nom.* White v. Regester, 412 U.S. 755 (1973). For examples of other cases involving discrimination in Texas, see Beal v. Holcombe, 193 F.2d 384, 388 (5th Cir. 1951) (city ordinance setting aside public parks for exclusive use of whites held unconstitutional); *In re* Gomez, 424 S.W.2d 656, 659 (Tex. Civ. App. 1967) (state statute prohibiting interracial adoptions held unconstitutional); Strauss v. State, 76 Tex. Crim. 132, 173

that Texas state law required a majority vote as a prerequisite to nomination in a party primary.[37] These factors were not considered invidious in themselves, but they "enhanced" the opportunity for racial discrimination.[38] More importantly, the plaintiff demonstrated that blacks and Mexican-Americans in the district did not have access to the political process.[39] *White* indicated that lack of access to the political system was to be the touchstone of vote dilution cases.[40]

The Fifth Circuit purported to follow the *White* criteria in *Zimmer v. McKeithen.*[41] The *Zimmer* court, however, found no direct evidence that blacks were limited in their access to the political system. Instead, the court relied solely upon evidence of past discrimination to sustain the challenge.[42] The theory the *Zimmer* court used was that an

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S.W. 663, 665-66 (1915) (upholding constitutionality of city ordinance forbidding sexual intercourse between blacks and whites).

[37] 412 U.S. at 766. A majority vote requirement, by definition, impedes the ability of minority groups to elect representatives.

[38] *Id.*

[39] *Id.* at 767. The district court found that the slating process in the Texas district in question was controlled by the Dallas Committee for Responsible Government. The court further found that a successful campaign was extremely difficult without the support of the Committee. The Committee routinely slated candidates without the assistance of black community leaders. The Committee did not need black support and did not seek it. Racial tactics were also used to discourage candidates who had black support. Graves v. Barnes, 343 F. Supp. 704, 726-27 (W.D. Tex. 1972), *rev'd sub nom.* White v. Regester, 412 U.S. 755 (1973).

[40] Indeed, the requirement that a plaintiff show that he and the members of his class lack access to the political system is the only evidentiary factor that is not related to effect. Although the Court will consider such factors as past discrimination and the unresponsiveness of legislators, these factors are nothing more than the result of the discriminatory impact of the electoral system. Thus, the Court is indicating that evidence of effect will be considered in determining discriminatory purpose. On the other hand, a showing that the plaintiff lacks access to the political process is indicative of something more than effect, since it guarantees that he will have no effective voice in the election process. *See* City of Mobile v. Bolden, 446 U.S. 55, 73-74 (1980) (criticizing the court of appeals' reliance on history, the lack of proportional representation, and the unresponsiveness of elected officials for purposes of showing discriminatory intent). *See generally* Note, *Racial Vote Dilution in Multimember Districts: The Constitutional Standard After Washington v. Davis,* 76 MICH. L. REV. 694, 731 (1978) (discussing the impact of multi-member districts on minority groups).

[41] 485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).

[42] 485 F.2d at 1301. The court found evidence of past racial discrimination in the form of segregated school systems, the interpretation tests as a prerequisite to vote, and the inability of blacks to register to vote in the district prior to 1962. *Id.*; *see, e.g.,* Louisiana v. United States, 380 U.S. 145, 151 (1965) (interpretation test is unconstitutional as a device to deprive blacks of the right to vote); Orleans Parish School Bd. v. Bush, 242

aggregate of the factors would be sufficient to show vote dilution.[43]

Whitcomb, White, and *Zimmer* all contained language that indicated that a showing of discriminatory purpose was required in vote dilution cases.[44] This requirement, however, was not considered significant[45] until the Supreme Court's decision in *Washington v. Davis.*[46] *Washington* was the first case to state specifically that under the equal protection clause of the fourteenth amendment a plaintiff must prove discriminatory purpose as well as effect.[47] Discriminatory intent does not have to be the dominant or primary motivation upon which a law rests.[48] Rather, determination of discriminatory intent requires inquiry into both circumstantial and direct evidence of purpose.[49]

F.2d 156, 166 (5th Cir. 1957) (segregated schools are unconstitutional).

[43] 485 F.2d at 1305; *see* Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248, 255 (5th Cir. 1978) (intent inferred from an aggregate of factors); Bolden v. City of Mobile, 571 F.2d 238, 245-46 (5th Cir. 1978) (same), *rev'd,* 446 U.S. 55 (1980); Nevett v. Sides, 571 F.2d 209, 224 (5th Cir. 1978) (same), *cert. denied,* 446 U.S. 951 (1980); Ferguson v. Winn Parish Police Jury, 528 F.2d 592, 599 (5th Cir. 1976) (dilution of black votes established by aggregate of factors).

[44] White v. Regester, 412 U.S. at 769; Whitcomb v. Chavis, 403 U.S. at 149; Zimmer v. McKeithen, 485 F.2d at 1304. *But see* City of Mobile v. Bolden, 446 U.S. 55, 107-09 (1980) (Marshall, J., dissenting) (vote dilution claims have never required a showing of discriminatory purpose); Burns v. Richardson, 384 U.S. 73, 88 (1966) (designed to have or had a discriminatory effect); Fortson v. Dorsey, 379 U.S. 433, 439 (1965) (designedly or otherwise discriminates against minorities).

[45] This is evidenced by the fact that many of the lower courts purported to require a showing of intent but invalidated election systems solely on evidence of effect. *See, e.g.,* Stewart v. Waller, 404 F. Supp. 206, 214 (N.D. Miss. 1975) (state law requiring at-large elections at the municipal level unconstitutional because the effects of the law were foreseeable).

[46] 426 U.S. 229 (1976).

[47] *Id.* at 238-39. *Washington* involved a challenge by blacks to a written personnel test that was a prerequisite to entering the Washington, D.C., police training program. The plaintiffs contended that the test discriminated against blacks because the percentage of black officers who failed the test was much higher than the percentage of white officers who failed. *Id.* at 232-33. The Court held that equal protection claims of racial discrimination required proof of discriminatory purpose. *Id.* at 238-39.

[48] *Id.* at 241.

[49] The complexity of determining discriminatory purpose lies in the fact that there seldom will be any direct evidence as to illicit motivation. It would be rare that an official would testify to the fact that he intended for a law to be discriminatory. *But cf.* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 142, 144 (3d Cir. 1977) (city mayor stated that he opposed placing black housing in white neighborhoods), *cert. denied,* 435 U.S. 908 (1978); Armstrong v. O'Connell, 451 F. Supp. 817, 826-27 (E.D. Wis. 1978) (school board official testified that school board was opposed to any form of integration); Mieth v. Dothard, 418 F. Supp. 1169, 1180 (M.D. Ala. 1976) (director of state highway department testified that certain physical requirements for state troopers were intended to be discriminatory in order to prevent women from holding a dangerous job). Evidence in

Most vote dilution cases prior to *Washington* were based on fourteenth amendment claims.[50] The courts, however, had not been entirely clear whether these cases rested upon the equal protection clause or upon a fundamental right to vote that was derived from the fourteenth amendment.[51] Indeed, this distinction had not been necessary prior to *Washington*. After *Washington*, the distinction represented a significant difference in the burden that the plaintiff must satisfy in order to succeed. This difference results from the fact that infringements on fundamental interests have traditionally required only a showing of effect.[52] Past vote dilution cases that involve black plaintiffs further complicate this problem since the claim could easily involve more than one constitutional infringement.[53] If a plaintiff could show that a multi-member district served to dilute the weight of his ballot in violation of his fundamental right to vote, then he would be successful without having to prove discriminatory motivation.[54]

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vote dilution cases will almost always be circumstantial. *See generally* Note, *Discriminatory Purpose and Disproportionate Impact: An Assessment After Feeny*, 79 COLO. L. REV. 1376, 1404-13 (1979) (discussion of direct and objective evidence as proof of discriminatory purpose).

[50] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 537 (1964) (vote dilution violative of the fourteenth amendment); Wesberry v. Sanders, 376 U.S. 1, 3 (1964) (same); Gray v. Sanders, 372 U.S. 368, 370 (1963) (same).

[51] The right to vote has long been considered fundamental. *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (right to vote is fundamental). The early vote dilution cases expressly recognized this right. *E.g.*, Reynolds v. Sims, 377 U.S. 533, 554 (1964) (there is a fundamental right to vote). The early cases also seemed to view vote dilution as an equal protection problem. *E.g., id.* at 568 (right to vote unconstitutionally impaired when weight of vote is diluted compared with weight of votes in other areas of state). This distinction became further confused when black plaintiffs were involved, since either constitutional standard could apply. *See generally* City of Mobile v. Bolden, 446 U.S. 55, 115-22 (1980) (Marshall, J., dissenting) (arguing vote dilution cases should be viewed as infringements on fundamental rights).

[52] The equal protection clause prohibits state action that discriminates against suspect classes, such as racial groups, or infringes on a fundamental right. Although evidence of intent is required in cases dealing with suspect classes, no proof of intent has been required in fundamental right cases. This is a result of the change of focus from the irrationality of laws that discriminate against people because of the color of their skin, to the infringement of a constitutionally guaranteed right possessed by most citizens. *See* Note, *supra* note 40, at 720-22 (equal protection clause protects both suspect classes and fundamental rights, but requirements of proof are different).

[53] In vote dilution cases with black plaintiffs, the court can focus on either the discrimination against of a suspect class or the infringement of the fundamental right to vote. *See* City of Mobile v. Bolden, 446 U.S. 55, 113 (1980) (Marshall, J., dissenting) (suggesting that the plurality confused the issues because the plaintiffs were black).

[54] *Compare* White v. Regester, 412 U.S. 755, 765 (1973) (vote dilution in multi-member district) *and* Whitcomb v. Chavis, 403 U.S. 124, 128-29 (1971) (same) *with*

This distinction was clarified by the United States Supreme Court in *City of Mobile v. Bolden.*[55] *Bolden* involved a challenge to Mobile's at-large system of electing city council members. Mobile's city government, in existence since 1911, consisted of a three-member city commission that combined the legislative and administrative functions.[56] The plaintiffs[57] contended that this at-large system served to submerge the effect of black votes and denied blacks an effective voice in city government. The plaintiffs alleged that this system violated their rights under the fourteenth and fifteenth amendments, as well as section 2 of the Voting Rights Act of 1965.[58] The plurality opinion[59] held that vote dilution claims were controlled by the equal protection clause of the fourteenth amendment[60] and, therefore, required proof that the election system was created or maintained for discriminatory purposes.[61] The plurality also held that the fifteenth amendment did not apply to vote dilution claims.[62] This position, however, was not

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Dunn v. Blumstein, 405 U.S. 330, 334, 360 (1972) (residency requirement before person can be eligible to vote held unconstitutional because of infringement on the fundamental right to travel) *and* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966) (Court invalidated a poll tax as an infringement on the right to vote). *See* note 52, *supra.* The problem with this argument is that at-large election schemes do not cause mathematical dilution of the weight of each voter's ballot. It is readily ascertainable that in an at-large district each vote is equal to every other vote. The basic problem lies in the fact that minorities in at-large systems have a smaller probability of electing their own representatives because the minorities simply do not have enough votes to win a majority. Thus, there is no direct interference with the weight of each voter's ballot.

[55] 446 U.S. 55 (1980).

[56] *Id.* at 59.

[57] This was a class action suit for the benefit of the black citizens of Mobile, Alabama. *Id.* at 58. Approximately 35.4% of Mobile's citizens were black. *Id.* at 58 n.1.

[58] *Id.* at 58. Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1976) states:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

[59] The plurality opinion was written by Justice Stewart, who was joined by Chief Justice Burger, Justice Powell, and Justice Rehnquist. 446 U.S. at 65.

[60] *Id.*

[61] *Id.* at 66.

[62] *Id.* at 65. The plurality held that the fifteenth amendment protected only against "purposefully discriminatory denial or abridgement by government of the freedom to vote 'on account of race, color, or previous condition of servitude.' " *Id. But see* Nevett v. Sides, 571 F.2d 209, 220 (5th Cir. 1978) (holding that the fifteenth amendment is applicable to vote dilution cases), *cert. denied,* 446 U.S. 951 (1980); Stewart v. Waller, 404 F. Supp. 206, 215 (N.D. Miss. 1975) (same).

supported by a majority of the Court.[63] Further, the plurality held that the plaintiffs' statutory claims added nothing to the case.[64] Concerning the sufficiency of proof, the plurality held that the plaintiffs had failed to show that the election system in Mobile had been created or maintained for discriminatory purposes.[65] Further, the plurality severely criticized the Fifth Circuit's use of the *Zimmer* criteria.[66] The criteria enumerated in *Zimmer* was held to be indicative of discriminatory purpose but clearly insufficient to warrant a finding of unconstitutionality.[67] The plurality further stated that evidence of a history of past official discrimination cannot be treated "in the manner of original sin."[68] The plurality also criticized the lower court's heavy reliance on economic and social factors in its determination of discriminatory intent.[69] Evidence of lack of responsiveness of elected officials was held to be relevant only as to those officials who were responsible for the creation or maintenance of the electoral system or to those who were responsible for impeding the plaintiffs' access to the political system.[70] A successful challenge to the submergence of a minority's votes in an at-large election system should include proof that the minority was effectively precluded from participation in the political system.[71]

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[63] 446 U.S. at 125 n.24; *see* notes 73, 84 and 87 and accompanying text *infra*.

[64] The Court stated that § 2 of the Voting Rights Act of 1965 was merely a statutory version of the fifteenth amendment. Therefore, it added nothing to the plaintiffs' fifteenth amendment claim. 446 U.S. at 61.

[65] *Id.* at 72-74. Mobile's form of municipal government was established in 1911. This was at a time when blacks were disenfranchised. Thus, it cannot be said that Mobile's form of municipal government was created for the purpose of diluting black voting strength. Proof that the at-large method of city elections was being maintained for the purpose of diluting black votes, however, would be sufficient to hold the election system invalid. *Id.*; *see, e.g.*, Nevett v. Sides, 571 F.2d 209, 222 (5th Cir. 1978) (although the election scheme in question was enacted at a time when blacks were disenfranchised, it could be successfully proven that the election system was maintained for a discriminatory purpose), *cert. denied*, 446 U.S. 951 (1980).

[66] 446 U.S. at 73. The *Zimmer* criteria include: "[1] the group's accessibility to political processes, [2] the responsiveness of representatives to the needs of the group, [3] the weight of the state policy behind at-large districting, and [4] the effect of past discrimination upon the electoral participation of the group." Zimmer v. McKeithen, 485 F.2d at 1305. The aggregate of these factors would be considered sufficient to raise an inference of discriminatory intent. Bolden v. City of Mobile, 571 F.2d at 242-43 n.5.

[67] 446 U.S. at 73.

[68] *Id.* at 74.

[69] *Id.* at 75 n.22. The Court stated that "gauzy sociological considerations have no constitutional basis." *Id.*

[70] *Id.* at 74 n.20.

[71] *Id.* at 74 nn.20 & 21. The Court found that there was no proof of any direct interference in the plaintiff class's participation in the political process. In fact, there

Justice Blackmun concurred only in the plurality's result,[72] and never reached the question of the application of the intent requirement to vote dilution cases.[73] Justice Blackmun contended, however, that the total abolition of Mobile's long-established form of city government was beyond the bounds of sound judicial discretion.[74]

Justice Stevens' concurrence indicated that he agreed with the plurality's conclusion that the requisite intent had not been sufficiently proven,[75] but disagreed with the reasoning used by the plurality in reaching its conclusion.[76] Justice Stevens stated that vote dilution cases should be divided into two categories.[77] The first category should include those cases that deal with the direct interference by the state with the right to vote.[78] Cases falling within this category should be tested by the most stringent standards.[79] The second category should include those cases that concern state action that affect the political strength of various groups.[80] Cases falling within this category should require a showing of discriminatory intent.[81] Justice Stevens reasoned that a determination of discriminatory intent should be predicated upon the objective intent of the decisionmaker rather than the subjective intent as proposed by the plurality.[82]

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was proof that black voters had the only slating organization in Mobile. *Id.* at 73.

[72] *Id.* at 80.

[73] *Id.* Justice Blackmun failed to discuss this issue. He indicated, however, that even if intent were a prerequisite to relief in vote dilution cases, he would agree with Justice White's dissent because the district court's findings amply supported an inference of discriminatory intent. *See* Bolden v. City of Mobile, 423 F. Supp. 384, 387-94 (S.D. Ala. 1976) (district court's findings of fact on question of discriminatory intent), *aff'd*, 571 F.2d 238 (5th Cir. 1978), *rev'd*, 446 U.S. 55 (1980).

[74] 446 U.S. at 80; *see* 423 F. Supp. at 404 (requiring Mobile to abandon its commission form of government and to adopt a mayoral system and a nine-member city council to be elected from single-member districts).

[75] 446 U.S. at 83.

[76] *Id.* at 85, 86.

[77] *Id.* at 83.

[78] *Id.* This would include such practices as poll taxes, literacy tests, or the reduction in the significance of a voter's ballot because of quantitative dilution. *Id.; see* notes 14 through 16 and accompanying text *supra*.

[79] 446 U.S. at 84.

[80] *Id.* at 83-84. This would include cases involving gerrymandering and the discriminatory use of multi-member or at-large voting districts. *See generally* Berry & Dye, *supra* note 17, at 86 n.7 (stating that multi-member districts are sometimes called institutional gerrymandering).

[81] 446 U.S. at 90.

[82] *Id.* Justice Stevens proposed a three-part standard that included: (1) a determination that the election system was manifestly not the product of a routine or traditional political system, (2) that the election system had a significant adverse impact on a mi-

Justice White, in his dissent, reasoned that sufficient evidence of discriminatory intent had been shown.[83] Further, Justice White concluded that multi-member election systems could be challenged under the fourteenth and fifteenth amendments.[84]

In a lengthy dissent, Justice Marshall concluded that past vote dilution cases had not required a showing of discriminatory intent.[85] He also argued that vote dilution claims should be viewed as a fundamental right issue rather than an issue involving a suspect class,[86] and that, further, multi-member election districts could be challenged under the fifteenth amendment.[87] Finally, Justice Marshall argued that discriminatory intent, if it were required, should be based upon a foreseeability standard.[88]

Shortly after the *Bolden* decision, a three-judge panel of the Fifth Circuit ruled on yet another challenge to at-large election systems in *McMillan v. Escambia County*.[89] *McMillan* combined challenges to the at-large elections of the Escambia County Commission and School Board, as well as the Pensacola City Council.[90] After expressing concern over the lack of clarity in the *Bolden* decision,[91] the *McMillan* court proceeded to adopt the plurality opinion of *Bolden* in its entirety.[92] Thus, although the *McMillan* plaintiffs alleged violations of the Civil Rights Acts of 1871[93] and 1957[94] and the Voting Rights Act of

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nority group, and (3) that the election system was maintained for either totally irrational purposes or entirely motivated by a desire to limit the political strength of the minority. *Id.*

[83] *Id.* at 102-03. Justice White stated that all the factors that had been present in *White* were present in the instant case. These factors included a lack of minority access to the candidate selection process, the unresponsiveness of elected officials to minority groups, and a history of discrimination. *Id.* at 101.

[84] *Id.* at 103; *see* note 44 and accompanying text *supra*.

[85] 446 U.S. at 107-08; *see* note 44 and accompanying text *supra*.

[86] 446 U.S. at 120; *see* note 51 and accompanying text *supra*.

[87] 446 U.S. at 126-29.

[88] *Id.* at 137. Justice Marshall reasoned that the common law foreseeability test would charge governmental units with the foreseeable consequences of their acts. Thus, there would be a strong inference that the discriminatory effects were desired. *Id.*

[89] 638 F.2d 1239 (5th Cir. 1981). This case came before Judges Coleman, Peck, and Kravitch. *Lodge* was decided by Judges Jones, Fay, and Henderson. This is significant because *Lodge* was decided within a month of *McMillan*, yet neither case mentioned the other.

[90] *Id.* at 1240.

[91] *Id.* at 1242.

[92] *Id.* at 1243.

[93] 42 U.S.C. § 1983 (Supp. III 1979).

[94] *Id.* § 1971(a)(1).

1965,[95] as well as violations of the fourteenth and fifteenth amendments, the court considered only the fourteenth amendment claim to be justiciable.[96]

The court then turned to the question of determining discriminatory intent and enumerated the factors it considered important.[97] The court, however, did not mention whether accessibility to the political process should be considered. Further, the court did not state whether any one of the evidentiary factors or the totality was sufficient to determine discriminatory intent.

Although these omissions threaten the precedential value of *McMillan*,[98] they did not affect the conclusions reached by the court for two reasons. First, the court upheld the at-large election of county commissioners simply because there was no evidence of discriminatory intent.[99] Therefore, it would have been useless to have considered the various evidentiary factors which might have been involved. Second, the court invalidated the at-large elections of school board and city council members because the election schemes were clearly *conceived* for invidious purposes.[100] Thus, the court did not have to draw inferences as to the motivation for the maintenance of the existing election

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[95] *Id.* § 1973.

[96] 638 F.2d at 1243 n.9. This position is contrary to the *Lodge* court's holding on the applicability of fifteenth amendment claims to vote dilution cases. *See* note 102 *infra*.

[97] 638 F.2d at 1243. The factors enumerated by the court included: (1) the historical background of the action, (2) the specific order of events, (3) procedural departures from the usual procedural sequence, (4) substantive departures from the usual procedural sequence, and (5) the legislative history of the decision-making body. *See* Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 267-68 (1977) (historical background of decision as evidentiary source).

[98] These factors have played an important and recurring role in vote dilution cases. *See* notes 33, 39, 40, 71 and accompanying text *supra*. Total exclusion of these factors from discussion seriously weakens future reliance on *McMillan*.

[99] 638 F.2d at 1245. The only evidence of disriminatory intent submitted at trial was that the county commissioners maintained the at-large election in order to retain their incumbency. *Id.* at 1244. The court held that the desire to retain one's incumbency, unaccompanied by evidence of any other motive, was not evidence of discriminatory intent. *Id.* at 1245.

[100] *Id.* at 1248. The distinguishing factor between *McMillan* and *Bolden* is that *McMillan* involved an election system that was created for discriminatory purposes. *Id.* On the other hand, *Bolden* involved an election system that was created for a neutral reason but was challenged as being maintained for a discriminatory purpose. *See* note 65 *supra*. *McMillan* also differs from *Bolden* because there was testimony by public officials regarding the motivation for the implementation of the at-large election systems. *See* 638 F.2d at 1247. This type of direct evidence was not present in *Bolden*. Direct evidence of discriminatory motivation logically reduces the need to draw inferences from circumstantial evidence.

systems.

In the instant case, the court reasoned that since the plaintiffs' action was predicated upon fourteenth and fifteenth amendment claims, the case was controlled[101] by the criteria set forth in *City of Mobile v. Bolden*.[102] Further, since the county commissioners were unresponsive to the particular needs of the plaintiffs,[103] and since the depressed socio-economic status[104] of the plaintiffs' combined with past[105] and present[106] official discriminatory actions served to impair the plaintiffs' access to the political process,[107] and since these factors were enhanced by additional characteristics[108] of the district, the court con-

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[101] 639 F.2d at 1376.

[102] *Id.* at 1363. The court concluded that the fifteenth amendment was applicable to vote dilution cases, since the majority of the Justices on the *Bolden* Court agreed that it should be construed broadly enough to encompass this type of case. The court held this to be the law despite the plurality's narrow construction of the amendment. *Id.* at 1372; *see* notes 55 through 62 and accompanying text *supra*.

[103] 639 F.2d at 1376. The unresponsiveness of the county commissioners to the needs of the class was demonstrated by the following: (1) allowing some blacks to be educated in largely segregated and inferior schools, (2) the token number of blacks who were hired by the county and the fact that they were being paid lower salaries than their white counterparts, (3) the appointment of relatively few blacks to boards and committees that oversee county government, (4) the failure to appoint any blacks to the judge-selection committee, (5) making road paving decisions in a manner that ignored the needs of black citizens, (6) forcing blacks to seek the aid of the courts in order to assert their rights to integrated schools, grand juries, and to register and vote without interference, and (7) contributing public funds to private schools in an effort to circumvent the requirements of integration. *Id.* at 1376-77.

[104] *Id.* at 1378. The court determined that the proportionally high poverty level of blacks in Burke county combined with their lack of education caused partially by past discrimination, had a negative impact on the blacks' ability to participate in the electoral process. *Id.* at 1378-79. The court reasoned that the deep-rooted discrimination in the South would further erode the practicality of electoral participation because county-wide campaigning by blacks would be effectively precluded by social stigma and racial tension. Further, the local Democratic Executive Committee had only one black member. The district court found that successful campaigning could come only through cooperation with this group. Thus, black participation in the political process was effectively precluded.

[105] *Id.* at 1378. The court determined that past discrimination caused black suffrage to be virtually nonexistent, produced bloc voting by whites, and led to inadequate and unequal educational opportunities for blacks that had a *present* effect on their ability to gain access to the political system. *Id.* at 1377-78.

[106] *Id.* at 1379. Under state law, maintenance of the election system was to be determined by the local district. GA. CODE ANN. § 34-702 (1980). The court found that white elected officials maintained the election system so as to minimize the ability of blacks to participate in the political process. 639 F.2d at 1379.

[107] 639 F.2d at 1379.

[108] *Id.* at 1380. The court found that the following factors enhanced the opportunity

cluded the totality of the circumstances was sufficient to establish an inference of discriminatory intent.[109]

In his dissent, Judge Henderson concluded that since the *Bolden* Court had disfavored heavy reliance on such factors as historical discrimination and sociological considerations,[110] and since the district court had given these factors equal weight in its determination,[111] the case should be remanded for consideration[112] under the *Bolden* criteria.[113]

The instant case places heavy reliance upon the recent *Bolden* decision.[114] The precedential value of *Bolden,* however, is severely impaired by the philosophical and legal differences among the Justices.[115] The number of opinions written in *Bolden* clearly emphasizes the complexity involved in cases dealing with the discriminatory effects of multi-member or at-large election systems. Thus, the *Bolden* decision leaves the lower courts with little guidance in a very complex area of constitutional law.

The Fifth Circuit's attempt in the instant case to reconcile *Bolden* with the previous cases dealing with multi-member districts[116] underscores the need for precise judicial guidelines in this important area. For instance, *Lodge* placed a great deal of weight upon evidence indicating discriminatory effect in its inquiry into discriminatory intent.[117] This is clearly inconsistent with *Bolden.*[118]

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to use an electoral process for invidious purposes: (1) Burke County, Georgia, is nearly two-thirds the size of the entire state of Rhode Island, (2) GA. CODE ANN. § 34-1513 (1980) provides that a candidate for political office in Georgia must receive a majority of the votes cast in order to be elected, and (3) there is no residency requirement for those seeking office. 639 F.2d at 1380.

[109] 639 F.2d at 1380.

[110] *Id.* at 1382 (citing City of Mobile v. Bolden, 446 U.S. 55, 74 (1980)).

[111] 639 F.2d at 1382.

[112] *Id.*

[113] *Id.* at 1381. Judge Henderson further reasoned that since majority rule was the essence of a democratic system and since all at-large election systems will invariably disadvantage minority groups, the court should require conclusive evidence of discriminatory intent. *Id.*

[114] *Id.* at 1363.

[115] *See* notes 73 through 87 and accompanying text *supra.*

[116] 639 F.2d at 1372-75.

[117] The court held that proof of unresponsiveness of elected officials was essential to prove discriminatory intent. *Id.* at 1375. The court also placed heavy reliance on past discrimination and socio-economic factors. *Id.* at 1376-80.

[118] *See* City of Mobile v. Bolden, 446 U.S. at 74 (stating that the unresponsiveness of elected officials is, at best, tenuous and circumstantial in proving discriminatory intent). The *Bolden* Court also specifically criticized lower courts' reliance on such factors

Lodge recognized, however, that the plaintiffs adequately proved that blacks in Burke County, Georgia, lacked access to the political system.[119] Thus, despite the misplaced emphasis on tangential factors, *Lodge* appears to meet the standards articulated by the plurality in *Bolden*.

Although *Lodge* may have reached the correct conclusion, the court's reasoning could lead lower courts to place reliance upon the same factors that were criticized in *Bolden*.[120] Clearly, there is a need for judicial guidance in this area of the law.[121]

The need for clarity in determining discriminatory intent in multi-member or at-large election system cases lends strength to the subjective test proposed by Justice Stevens in his concurrence in *Bolden*.[122] Justice Stevens' test would require that the plaintiff prove that the decision to create or to maintain the multi-member or at-large election scheme was manifestly a product of a routine political decision,[123] that the election system had a significant adverse impact upon the minority group,[124] and that the election system was maintained for either totally irrational purposes or entirely motivated by a desire to limit the political strength of the minority.[125] This standard is clear and concise and

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as past history of discrimination and socio-economic conditions. *See* notes 68 and 69 *supra*.

[119] *See* note 78 and accompanying text *supra*.

[120] *See* notes 104 and 105 *supra*.

[121] The need for clear judicial standards is highlighted by two district court opinions decided subsequent to *Lodge*, in which, on facts almost identical to *Lodge*, two different conclusions were reached. In Bailey v. Vining, 514 F. Supp. 452 (M.D. Ga. 1981), the district court, relying on *Lodge*, held an at-large method of election invalid based on the "totality of the circumstances." *Id.* at 462. Even though the court found that blacks lacked access to the political process, it is clear that the court gave great weight to such factors as past discrimination. *Id.* at 460-62. On the other hand, the district court, in Perkins v. City of West Helena, 514 F. Supp. 770 (E.D. Ark. 1981), relying on the *Bolden* opinion, upheld an at-large election system on the ground that there was no showing of discriminatory intent. *Id.* at 782. The court specifically found that "no group is denied access to the political system." *Id.* at 781. The court further noted that it must not place heavy reliance on the state's past history of discrimination. *Id.*

Both cases may be viewed as correct. The divergent holdings can be explained by the courts' application of differing interpretations of the *Bolden* standards. Had the standards that each court employed been reversed, the results of the cases could conceivably have been different.

[122] *See* note 82 *supra*.

[123] *Cf.* Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) (stating that laws that are normally lawful become unlawful when passed to attain an unlawful end); United States v. Reading Co., 226 U.S. 324, 357 (1912) (same).

[124] *See* note 31 *supra*.

[125] *See* note 52 *supra*.

could be applied easily by the lower courts.

The dissent in *Lodge* pointed out that all at-large election systems will disadvantage one or more minority groups.[126] It has been consistently held, however, that multi-member election systems are not unconstitutional per se[127] since multi-member districts do not mathematically dilute the vote of the individual.[128] Each vote is given the same weight.[129] Although there is no constitutional guarantee of proportional representation,[130] the idea that an election system was purposefully created or maintained to deprive minority groups of representation in government is repugnant to the spirit of the Constitution.

The *Lodge* dissent also recognized that the majority's test for determining discriminatory intent is unworkable because it does not allow the political process to function effectively.[131] Indeed, the *Lodge* court's heavy reliance upon evidence of discriminatory effect in order to prove discriminatory motivation could place most multi-member and at-large election systems in jeopardy.[132] Therefore, the challenge before the courts is to clarify the standard to be used by the trial courts in determining the requisite discriminatory intent.

W. Thomas Siler, Jr.

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[126] 639 F.2d at 1382.

[127] *See* note 29 and accompanying text *supra*.

[128] *See* note 54 *supra*.

[129] *See* note 54 *supra*.

[130] City of Mobile v. Bolden, 446 U.S. at 66; White v. Regester, 412 U.S. at 765-66; Whitcomb v. Chavis, 403 U.S. at 149-50; *cf.* United Jewish Orgs. v. Carey, 403 U.S. 144, 166-67 (1977) (voter cannot complain merely because voting follows racial lines).

[131] 639 F.2d at 1382.

[132] Most at-large election systems will have some discriminatory impact on minority groups. *See* note 108 *supra*. Therefore, there will normally be evidence of discriminatory impact. If evidence of discriminatory impact receives the attention that the *Lodge* court placed on it, many at-large election schemes could be held unconstitutional.

Constitutional Law—Equal Protection—Male Only Draft Registration Does Not Violate the Equal Protection Component of the Fifth Amendment.

Plaintiffs[1] brought a class action suit[2] in the United States District Court for the Eastern District of Pennsylvania challenging the constitutionality of the registration provisions of the Military Selective Service Act of 1971 (MSSA).[3] Plaintiffs alleged that the exclusion of fe-

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[1] The original complaint was filed in June, 1971 by four young men subject to registration and conscription. Three of the plaintiffs had not yet reached the age of 18 at the time the original action was filed; the fourth had already registered with the Selective Service System. Rowland v. Tarr, 341 F. Supp. 339, 340 (E.D. Pa. 1972), *aff'd in part and vacated in part per curiam*, 480 F.2d 545 (3d Cir. 1973).

In 1972, the district court denied the plaintiffs' application to convene a three-judge court on jurisdictional grounds and sustained the defendants' cross-motion to dismiss the complaint. 341 F. Supp. at 343. The court of appeals upheld the dismissal of all claims except that of unconstitutional gender-based discrimination. The court of appeals ordered the district court to determine the existence of the plaintiffs' standing to assert the claim and, also, to determine whether the claim warranted the convening of a three-judge panel. 480 F.2d at 546-47. On remand, the district court denied the defendants' motion to dismiss the case as moot, concluding that although authority to draft registrants had lapsed by 1973, the plaintiffs were still subject to criminal sanctions under the registration law. Rowland v. Tarr, 378 F. Supp. 766, 772 (E.D. Pa. 1974). The proceedings stalled, and in June, 1979, the district court proposed to dismiss the case because of the inaction of the parties. Following additional discovery, the defendants' motion to dismiss was denied. Goldberg v. Tarr, 510 F. Supp. 292, 297 (E.D. Pa. 1980).

Ultimately, the district court ruled that draft registration that excluded women was unconstitutional. Goldberg v. Rostker, 509 F. Supp. 586, 605 (E.D. Pa. 1980), *rev'd*, 101 S. Ct. 2646 (1981). The following day, Justice Brennan issued an order staying execution and enforcement of the district court's judgment. Rostker v. Goldberg, 448 U.S. 1306, 1311 (1980).

[2] Plaintiffs filed suit individually and as representatives of a class then subject to induction into the armed forces. On July 1, 1980, a plaintiff class was certified, consisting of "all male persons who are registered or subject to registration under 50 U.S.C. App. § 453 or are liable for training and service in the armed forces of the United States under 50 U.S.C. App. §§ 454, 456(h) and 467(c)." Goldberg v. Rostker, 509 F. Supp. 586, 588-89 (E.D. Pa. 1980), *rev'd*, 101 S. Ct. 2646 (1981). On July 18, 1980, the class was amended to include males "who are also either subject to registration under Presidential Proclamation No. 4771 (July 2, 1980) or are presently registered with the Selective Service System." 509 F. Supp. at 605.

[3] Rostker v. Goldberg, 101 S. Ct. 2646, 2650 (1981). The Military Selective Service Act of 1971, § 101, is codified at 50 U.S.C. App. §§ 451-473 (1976).

Congress is empowered by the United States Constitution "[t]o raise and support Armies," U.S. Const. art. I, § 8, cl. 12, "[t]o provide and maintain a Navy," *id.* cl. 13, and "[t]o make Rules for the Government and Regulation of the land and naval Forces,"

males from draft registration invidiously discriminated against males in violation of the equal protection component of the fifth amendment.[4] In response to plaintiffs' assertion that the intermediate scrutiny standard[5] was applicable, defendants[6] argued that the subject matter of the challenged legislation mandated extreme judicial defer-

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id. cl. 14. Pursuant to this grant of constitutional authority, Congress enacted the Military Selective Service Act (MSSA), which provides for selective service registration of every male citizen and male resident alien between the ages of 18 and 26. 50 U.S.C. app. § 453 (1976). The purpose of this registration is to facilitate conscription in the event of a national emergency. President's State of the Union Address, 16 WEEKLY COMP. OF PRES. DOC. 198 (Jan. 23, 1980). The MSSA renders those persons registered under the Act liable for training and service in the armed forces. 50 U.S.C. app. § 454(a) (1976).

The Act was amended to preclude conscription as of July 1, 1973. Act of Sept. 28, 1971, Pub. L. No. 92-129, § 101(a)(35), 85 Stat. 353 (codified at 50 U.S.C. app. § 467(c) (1976)). Thus, an actual draft would require congressional approval. Draft registration under § 453 was discontinued by President Ford in 1975. Presidential Proclamation No. 4360, 3 C.F.R. 462 (1971-1975 Compilation), *reprinted in* 50 U.S.C. app. § 453, at 1994 (1976) *and in* 89 Stat. 1255 (1975).

In early 1980, President Carter announced his decision to seek reactivation of registration following the invasion of Afghanistan by the Soviet Union. President's State of the Union Address, 16 WEEKLY COMP. OF PRES. DOC. 196-98 (Jan. 23, 1980). Actual conscription was not sought by the President, and therefore was not an issue in this litigation. The Selective Service System had been inactive since 1975, and funds were needed to reactivate registration; consequently, the President recommended that Congress transfer funds from the Department of Defense to the Selective Service System. SUPPLEMENTAL APPROPRIATIONS AND BUDGET AMENDMENTS, H.R. DOC. NO. 267, 96th Cong., 2d Sess. 2 (1980). The President further recommended that Congress amend the MSSA to permit registration and conscription of women. PRESIDENTIAL RECOMMENDATIONS FOR SELECTIVE SERVICE REFORM, H.R. DOC. NO. 265, 96th Cong., 2d Sess. 10 (1980). The House of Representatives rejected the President's proposal to register women, 126 CONG. REC. H2752-53 (daily ed. April 22, 1980), and the Senate concurred. *Id.* S6773 (daily ed. June 12, 1980). Congress then allocated the necessary funds for registration of men. Act of June 27, 1980, Pub. L. No. 96-282, 94 Stat. 552.

The registration of 19 and 20 year old males was ordered by presidential proclamation on July 2, 1980 pursuant to authority conferred by the MSSA. Presidential Proclamation No. 4771, 3 C.F.R. 82 (1980).

[4] The fifth amendment provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

The complaint filed in 1971 challenged the MSSA on several grounds in addition to that of unconstitutional gender-based discrimination. The plaintiffs contended that the Act amounted to a taking of property without due process of law, imposed involuntary servitude, violated rights of free expression and assembly, and was unlawfully implemented to advance an unconstitutional war. 101 S. Ct. at 2650 n.2.

[5] *See* notes 50 through 58 and accompanying text *infra.*

[6] Curtis Tarr was director of the Selective Service System and was a named defendant when the suit was filed in 1971. His successor, Bernard Rostker, was substituted as a defendant by stipulation of the parties. 509 F. Supp. at 588 n.1.

ence.[7] The district court ruled that the registration provisions of the MSSA created an unjustified gender-based classification and in so doing unconstitutionally discriminated between males and females.[8] On appeal, the United States Supreme Court, *held,* reversed. The requirement that only males register for possible conscription under the MSSA does not deprive males of their constitutional rights under the equal protection component of the fifth amendment. *Rostker v. Goldberg,* 101 S. Ct. 2646 (1981).

In the early years after its inception, the equal protection clause was not a favored method of invalidating state or federal legislation.[9] In fact, before the 1960's judicial intervention through invocation of equal protection mandates was virtually nonexistent outside racial discrimination cases.[10] Initially, the clause was held to apply exclusively to the protection of the negro race.[11] Between 1885 and 1937, the equal protection clause was used to determine whether legislative classifications were reasonably related to a legitimate governmental interest and were, therefore, constitutional.[12] After 1937, the Supreme Court adhered to a two-tier standard of review: (1) an extremely deferential standard with regard to social and economic legislation, known as the rational basis test,[13] and (2) the strict scrutiny standard, requiring that

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[7] *See* notes 66 through 75 and accompanying text *infra.*

[8] 509 F. Supp. at 605.

[9] Justice Holmes once characterized the equal protection doctrine as "the usual last resort of constitutional arguments . . . ." Buck v. Bell, 274 U.S. 200, 208 (1927).

[10] *See, e.g.,* Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 368 (1940) (equal protection denied railroads); Davidson v. Board of Adm'rs, 97 U.S. 97, 106 (1878) (unequal taxation by the states not prohibited by equal protection clause).

[11] The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872).

[12] *See, e.g.,* Reinman v. City of Little Rock, 237 U.S. 171, 177 (1915) (ordinance classifying livery stable as nuisance per se reasonably related to state's interest in regulating business); Powell v. Pennsylvania, 127 U.S. 678, 687 (1888) (law forbidding manufacture of oleomargerine was applied equally to all similar manufacturers and was reasonably related to the protection of public health); Barbier v. Connolly, 113 U.S. 27, 31-32 (1885) (prohibiting washing and ironing in public laundries during certain hours was within police power).

[13] The rational basis test looks to whether there is a legitimate state interest and whether the means to further the interest are rationally related to it: "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Williamson v. Lee Optical, 348 U.S. 483, 488 (1954) (approving a system of regulations forbidding certain opticians from fitting eyeglass lenses as being rationally related to promoting public health); Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 221 n.1, 225 (1949) (prohibition of life insurance agents from serving as undertakers and undertakers from serving as life insurance agents was a reasonable regulation of business); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 564 (1947) (state pilotage program reasonably related to ensuring river

when a classification has been deemed "suspect"[14] or there has been an infringement of a fundamental right,[15] the legislation must be necessary to promote a compelling governmental interest.[16]

The determinative question in modern equal protection cases, particularly those involving gender-based classifications, has been which standard of review to apply: rational basis, strict scrutiny, or something in between.[17] The pattern of review for gender-based classifica-

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safety).

In United States v. Carolene Prods. Co., 304 U.S. 144 (1938), the Court rejected a due process challenge to federal prohibitions on interstate shipments of "filled milk" as rationally related to promoting the public health. *Id.* at 147. In a footnote with significant implications in equal protection analysis, Justice Stone, writing for the majority, suggested that a stronger case for judicial intervention may exist in the regulation of matters other than commercial transactions. *Id.* at 152 n.4.

[14] The Supreme Court has ruled that certain classifications are inherently suspect, triggering application of the strict scrutiny standard of review. *See, e.g.,* Loving v. Virginia, 388 U.S. 1, 11 (1967) (race); Korematsu v. United States, 323 U.S. 214, 216 (1944) (national origin). *Compare* Foley v. Connelie, 435 U.S. 291, 296 (1978) (applying rational basis test in upholding state statute barring aliens from employment as state troopers) *with* Graham v. Richardson, 403 U.S. 365, 372 (1971) (strict scrutiny scope of review applied to invalidate state law denying welfare assistance to aliens).

The Court has specifically declined to apply strict scrutiny to other classifications. *See, e.g.,* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (age); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973) (wealth).

[15] The Supreme Court has determined that certain rights are fundamental and that restrictions placed upon these rights are subject to strict judicial scrutiny. *See, e.g.,* Roe v. Wade, 410 U.S. 113, 155 (1973) (rights of a uniquely private nature); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (right of access to ballot); Loving v. Virginia, 388 U.S. 1, 12 (1967) (right to marry); United States v. Guest, 383 U.S. 745, 757-58 (1966) (right to interstate travel); Harper v. Virginia State Bd. of Elections, 383 U.S. 536, 552 (1966) (right to vote); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (right to procreate).

The Supreme Court has refused to declare certain other rights fundamental. *See, e.g.,* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (right to an education); United States v. Kras, 409 U.S. 434, 445 (1973) (right to discharge in bankruptcy); Lindsey v. Normet, 405 U.S. 56, 73-74 (1972) (right to housing); Dandridge v. Williams, 397 U.S. 471, 486 (1970) (right to welfare payments).

[16] *E.g.,* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 630-33 (1969) (state statute enabling only persons owning or leasing taxable property to vote in school district elections held unconstitutional where unsupported by compelling governmental interest); Shapiro v. Thompson, 394 U.S. 618, 627 (1969) (absence of compelling governmental interest rendered state law denying welfare benefits based on residency requirement unconstitutional).

[17] *See, e.g.,* Craig v. Boren, 429 U.S. 190, 197 (1976) (applying intermediate level review); Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion) (utilizing strict scrutiny standard); Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (rational basis test employed). One commentator has suggested that part of the problem in ascertaining the

tions during the later nineteenth and early twentieth centuries was one of extreme deference to legislative judgments concerning women's role in society.[18] Restrictions placed on women were generally upheld as serving a reasonable state interst.[19] The Supreme Court found little occasion to review legislation employing gender distinctions until the 1970's because it considered its earlier rulings dispositive of the issue.[20] Opposition to the Vietnam War during the late 1960's and early 1970's raised a flurry of equal protection objections to gender distinctions in the draft laws, which excluded women from registration and conscription.[21] In each case, the equal protection challenge was ultimately re-

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appropriate standard to apply is determining whether "a particular law does or does not amount to racial discrimination, or discrimination based on sex, or the like." Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. Rev. 541, 557 (1977). *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979) (employment preference laws that significantly disadvantaged women were not gender-based); Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974) (state disability insurance system that excluded from coverage disability accompanying normal pregnancy held not gender-based).

[18] *See, e.g.*, Muller v. Oregon, 208 U.S. 412, 421 (1908) (sustaining state law setting maximum number of hours females are allowed to work); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 163, 170 (1874) (upholding state constitutional provision limiting the right to vote to men); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 138 (1873) (women denied license to practice law solely on basis of sex).

[19] *See, e.g.*, Hoyt v. Florida, 368 U.S. 57, 61-62 (1961) (state law excluding women from serving on juries upheld as related to state's interest in allowing women to continue as "the center of home and family life"); Goesaert v. Cleary, 335 U.S. 464, 467 (1948) (state law prohibiting women from working as bartenders prevented social and moral problems).

[20] *See generally* Ginsburg, *Sex, Equality and the Constitution*, 52 Tul. L. Rev. 451, 454-70 (1978) (discussion of Court's equal protection policy toward gender-based classifications). The lower federal courts were more active in ruling on gender-based classifications prior to the 1970's. These courts generally applied the rational basis test and rarely invalidated the challenged legislative classification. *See, e.g.*, Miskunas v. Union Carbide Corp., 399 F.2d 847, 850 (7th Cir. 1968) (statute permitting a husband, but not a wife, to sue for loss of consortium upheld), *cert. denied*, 393 U.S. 1066 (1969); Gruenwald v. Gardner, 390 F.2d 591, 592 (2d Cir. 1968) (statute according women more favorable treatment than men in computing social security benefits sustained against equal protection challenge). *But see, e.g.*, Karczewski v. Baltimore & O.R.R., 274 F. Supp. 169, 179 (N.D. Ill. 1967) (statute prohibiting only women from suing for loss of consortium violated fourteenth amendment equal protection clause); White v. Crook, 251 F. Supp. 401, 409 (M.D. Ala. 1966) (statute denying women the right to serve on juries unconstitutional).

[21] *See,e.g.*, United States v. Baechler, 509 F.2d 13, 14-15 (4th Cir. 1974) (per curiam) (rational basis existed for exluding women from draft registration), *cert. denied*, 421 U.S. 993 (1975); United States v. Bertram, 477 F.2d 1329, 1330 (10th Cir. 1973) (same); United States v. Camara, 451 F.2d 1122, 1126 (1st Cir. 1971) (same), *cert. denied*, 405 U.S. 1074 (1972); United States v. Fallon, 407 F.2d 621, 623 (7th Cir.) (same), *cert. denied*, 395 U.S. 908 (1969); United States v. Offord, 373 F. Supp. 1117, 1118 (E.D. Wis.

jected, almost always through application of the rational basis standard.[22] Commentators have discounted the significance of this body of case law to any renewed registration challenge since all were decided before the current standard of review for gender-based classifications[23] had fully evolved.[24]

The first sign of the Supreme Court's willingness to reevaluate the traditional rational basis standard in the context of sex discrimination came in *Reed v. Reed*.[25] In *Reed* a unanimous Court invalidated an Idaho statute giving preference to males over females in the appointment of estate administrators.[26] Using language evocative of the old equal protection standard, Chief Justice Burger declared that legislative classifications must rest upon some ground of difference bearing a fair and substantial relation to the object of the statute.[27] Indeed, the Court purported to apply a rational basis standard[28] and acknowledged no break with controlling precedent.[29] Clearly, however, the Court had not applied the deferential standard, but had instead postulated an unarticulated, heightened, but less than strict scrutiny of gender classifications.[30]

1974) (same); United States v. Yingling, 368 F. Supp. 379, 384-89 (W.D. Pa. 1973) (same); United States v. Dorris, 319 F. Supp. 1306, 1308 (W.D. Pa. 1970) (same); United States v. Cook, 311 F. Supp. 618, 621-22 (W.D. Pa. 1970) (same); United States v. Clinton, 310 F. Supp. 333, 336 (E.D. La. 1970) (same); Suskin v. Nixon, 304 F. Supp. 71, 72 (N.D. Ill. 1969) (same); United States v. St. Clair, 291 F. Supp. 122, 125 (S.D.N.Y. 1968) (same).

[22] *See* note 21 *supra*. Only one federal district court during this period found the exclusion of females from the draft to be unconstitutional. In United States v. Reiser, 394 F. Supp. 1060 (D. Mont. 1975), *rev'd*, 532 F.2d 673 (9th Cir.), *cert. denied*, 429 U.S. 838 (1976), the district court denominated sex a suspect classification and applied the strict scrutiny standard of review. 394 F. Supp. at 1063-64. On appeal, the court of appeals reversed, applying the traditional rational basis test. 532 F.2d at 673.

[23] *See* notes 50 through 54 and accompanying text *infra*.

[24] *See* Roberts, *Gender-Based Draft Registration, Congressional Policy and Equal Protection: A Proposal for Deferential Middle-Tier Review*, 27 WAYNE L. REV. 35, 53 (1980) (development of intermediate standard of review has rendered Vietnam War era cases untenable); Note, *Women and the Draft: The Constitutionality of All-Male Registration*, 94 HARV. L. REV. 406, 407-08 (1980) (war-related cases will be of little value in determining the sex discrimination issues raised by the renewal of draft registration).

[25] 404 U.S. 71 (1971).

[26] *Id.* at 73.

[27] *Id.* at 76.

[28] *See id.* The Court's purported standard was "whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of [the contested statutes]." *Id.*

[29] *Id.* at 75-76.

[30] *See* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving*

The next significant case in the development of a coherent intermediate standard of review for gender-based classifications was *Frontiero v. Richardson.*[31] The issue was the same as in *Reed,* but was placed in the context of military fringe benefits.[32] Writing for a plurality of the Court, Justice Brennan found sex a suspect classification, subject to strict judicial scrutiny.[33] Justice Brennan suggested three factors that make a classification suspect: (1) the class suffers from an immutable characteristic, determined solely by the accident of birth, which bears no relation to the individual's capability to contribute to society;[34] (2) the class has historically suffered discrimination and vilifications;[35] and, (3) the class, largely as a result of past discrimination,

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Doctrine on a Changing Court: A Model for Equal Protection, 86 HARV. L. REV. 1, 34 (1972) (*Reed* not reflective of traditional standard of review since statutory objectives were reasonable and effected by statute).

[31] 411 U.S. 677 (1973).

[32] Sharron Frontiero, a lieutenant in the U.S. Air Force, challenged a regulation that allowed a male service member to claim his wife as a dependent without having to prove her actual dependency. Frontiero's application for increased quarters allowances and for housing and medical benefits for her husband had been denied because she failed to prove, pursuant to the regulation, that her husband was dependent on her for more than one-half of his support. *Id.* at 680.

[33] *Id.* at 682. Joining Justice Brennan's plurality opinion were Justices Douglas, White, and Marshall. *Id.* at 678. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred in the judgment but refused to find sex a suspect classification. *Id.* at 691-92. Justice Stewart's one-sentence concurrence cited the holding in *Reed* as dispositive of Frontiero's claim. *Id.* at 691. Justice Rehnquist dissented. *Id.* Ironically, both Justice Brennan's plurality opinion, applying strict scrutiny, and Justice Powell's concurrence, applying the traditional rational basis test, relied on *Reed* as supporting their respective positions. *Id.* at 682, 692.

[34] *Id.* at 686.

[35] *Id.* at 685. This distinction was troublesome for the plurality. The *Frontiero* plurality divided in Kahn v. Shevin, 416 U.S. 351 (1974), where the Court upheld a Florida law providing widows but not widowers an annual $500 property tax exemption. *Id.* at 356. Justice Douglas writing for the Court in *Kahn* stated that the benign nature of the gender-based classification was substantially related to the subject of the legislation. *Id.* at 352. In dissent, Justice Brennan, joined by Justice Marshall, concluded that any gender-based distinction was suspect. Justice Brennan noted that although the Florida law was supported by the compelling governmental interest of redressing past discrimination, the state's interest would have been better served by a statute excluding wealthy widows from the tax benefits. *Id.* at 358-60. Justice White also found the classification suspect but disagreed with Justice Brennan, reasoning that the most effective remedy was a statutory scheme focusing on the individual needs of both widows and widowers. *Id.* at 361-62.

The disintegration of the *Frontiero* plurality in *Kahn* resulted primarily from *Frontiero's* compelling the exclusion of males from protection that was afforded females. *See* Wilkinson, *The Supreme Court, The Equal Protection Clause, and The Three Faces of Constitutional Equality,* 61 VA. L. REV. 945, 982-83 (1975) (men have not suffered a

lacks effective political power and redress.[36] The *Frontiero* Court stressed that it found no arguable justification for the challenged classification other than administrative convenience,[37] but the Court refused to indicate how it would react to gender distinctions grounded in a strongly articulated policy basis.[38]

The continuing difficulty of the Supreme Court in clearly articulating a middle-tier standard of review was indicated by the decisions rendered in *Schlesinger v. Ballard*[39] and other sex discrimination cases decided the same year.[40] *Ballard* is one of the few major equal protection opinions dealing with military issues.[41] Suit was brought by a male naval officer challenging a military promotion system that accorded females a longer period of time than males to attain promotions necessary to continued service.[42] Relying on Justice Brennan's plurality

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history of discrimination).

[36] 411 U.S. at 686 n.17.

[37] *Id.* at 688-89.

[38] For a discussion of the Supreme Court's deferential approach to gender-based distinctions in specific policy areas, see notes 66 through 71 and accompanying text *infra*.

[39] 419 U.S. 498 (1975).

[40] Stanton v. Stanton, 421 U.S. 7 (1975), involved a challenge to a statute allowing a father to withdraw child support payments from his daughter when she reached 18 years of age. A similarly situated male would continue to receive support until age 21, theoretically enabling him to complete his education. 421 U.S. at 14-15. Relying on *Reed*, the Court concluded that the statutory distinction could not survive an equal protection attack under any test, neither strict scrutiny, rational basis, nor an intermediate standard. *Id.* at 17. Significantly, the Court did not state which test was to be applied but ruled that the statute would fail under any test. *Id.*

In Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), the gender-based distinction at issue denied a widower social security benefits after the death of his wife, who had supported him. 420 U.S. at 637-38. The Court concluded that the provision was indistinguishable from the regulation invalidated in *Frontiero*. *Id.* at 645. The majority rejected the Government's argument that the classification was intended to compensate women as a group for past economic discrimination. *Id.* at 648. The Court insisted that the benign intent be genuinely rooted in the actual legislative purpose. Justice Brennan stated that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Id.* at 648.

[41] *See* notes 66 through 71 and accompanying text *infra*.

[42] 419 U.S. at 499-500. The challenged statute was 10 U.S.C. § 6382(a) (1960), which provided for mandatory discharge of officers of certain rank who had failed to be selected for promotion a second time. The plaintiff, who had nine years of active service, claimed that were a woman in his position she would have been subject to a separate statute, 10 U.S.C. § 6401(a) (1960). 419 U.S. at 500. Under § 6401(a), a female Naval officer was entitled to 13 years of commissioned service before she faced mandatory discharge for want of promotion. Ballard claimed that this inequality in discharge policies constituted

opinion in *Frontiero*,[43] a three-judge federal district court invalidated the statutory provisions involved.[44] The Supreme Court reversed without explicitly stating the standard of review it applied.[45] The Court found that men and women were not similarly situated and, therefore, the disparate treatment was justified.[46] Four justices dissented, arguing that sex should be deemed a suspect class.[47]

Justice Brennan finally found his majority in *Craig v. Boren*.[48] The *Craig* Court enunciated a new middle-tier standard of review for gender-based classifications when it invalidated an Oklahoma statute having different minimum ages for men and women to purchase beer.[49] The Court stated, "To withstand constitutional challenge, . . . classifi-

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sex discrimination in violation of the due process clause of the fifth amendment. 419 U.S. at 500.

[43] *See* notes 31 through 38 and accompanying text *supra*.

[44] Ballard v. Laird, 360 F. Supp. 643, 647-48 (S.D. Cal. 1973), *rev'd sub nom.*, Schlesinger v. Ballard, 419 U.S. 498 (1975). The district court concluded that the classification was inherently suspect and that the mandatory discharge provisions were supported solely by considerations of fiscal and administrative convenience. 360 F. Supp. at 647-48.

In reaching its decision, the district court relied primarily on *Frontiero*. *Id.* Other lower courts, in interpreting *Frontiero*, have reached contradictory results. *Compare* Johnston v. Hodges, 372 F. Supp. 1015, 1018 (E.D. Ky. 1974) (applying strict scrutiny in invalidating law requiring a minor's driver's license application to be signed by father, not mother, if father is living) *with* Kovach v. Middendorf, 424 F. Supp. 72, 77 (D. Del. 1976) (applying rational basis test in upholding Navy's awarding disproportionately low number of NROTC scholarships to women) *and* Edwards v. Schlesinger, 377 F. Supp. 1091, 1096 (D.D.C. 1974) (applying rational basis in refusal to consider females for appointment to Air Force and Naval Academies), *rev'd sub nom.* Waldie v. Schlesinger, 509 F.2d 508 (D.C. Cir. 1975).

[45] 419 U.S. at 505-10.

[46] *Id.* at 508. Justice Stewart writing for the majority based the distinction on the fact that exclusion of women from combat denied women the same opportunities for promotion as men. Justice Stewart stated, "[T]he different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service." *Id.*

[47] Justice Brennan's dissenting opinion was joined by Justices Douglas and Marshall. *Id.* at 511. Justice White dissented without filing an opinion but noted his substantial agreement with Justice Brennan's reasoning. *Id.* at 521. Justice Brennan noted the troubling aspect of justifying one act of gender-based discrimination (different promotion times) by a second and more pervasive discriminatory scheme (exclusion of women from combat positions). *Id.* at 511 n.1.

[48] 429 U.S. 190 (1976). Justice Brennan wrote the majority opinion in which Justices White, Marshall, Powell, and Stevens joined. *Id.* at 191.

[49] *Id.* at 197. OKLA. STAT. tit. 37, § 241 (1958 & Supp. 1976) made it unlawful for any person to sell 3.2% beer to minors. A separate statute defined "minor" for purposes of § 241 as females under the age of 18 and males under the age of 21. *Id.* § 245.

cations by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[50] The Court accepted the district court's finding that the statute's legislative purpose was the improvement of traffic safety,[51] but it found that there was an insufficient relationship between the desired end and the selected means of implementation[52] to support the gender-based differential.[53] *Craig* was also important because it demonstrated the Court's willingness to strike down gender distinctions that discriminated against men as well as against women.[54] The *Craig* test of whether a statute or regulation impermissibly discriminates on the basis of gender has been applied consistently by the Supreme Court since 1976 but with varying results. For example, the Court has invalidated statutory schemes that distinguished between widows and widowers in awarding survivor's benefits.[55] On the other hand, statutes providing

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[50] 429 U.S. at 197. The Court relied on *Reed, Stanton, Wiesenfeld,* and *Frontiero* as authority for the heightened standard of review. *Id.* at 197-99. Subsequent cases and commentaries cite *Reed* as the origin of the intermediate scrutiny standard. *See, e.g.,* Michael M. v. Superior Court, 101 S. Ct. 1200, 1204 (1981) (plurality) (noting that *Craig* restated *Reed* test); Orr v. Orr, 440 U.S. 268, 278-81 (1979) (same); Steele, *Males Only Draft Registration: An Equal Protection Analysis,* 11 CUM. L. REV. 295, 299 n.18 (1980) (suggesting that the utilization of the heightened review standard in *Craig* conformed to the Court's evolving trend); Ginsberg, *Sex, Equality and the Constitution,* 52 TUL. L. REV. 451, 458 (1978) (*Reed* marked initial departure from rational basis analysis).

[51] 429 U.S. at 199-200.

[52] *Id.* at 204. Exhaustive evidence dealing with the statistical relationship between age, sex, drinking, and traffic accidents was presented and evaluated. *Id.* at 200-03 & 200 n.8, 201 nn.9 & 11, 202 nn.12-14, 203 n.16. The Court concluded that, while in some instances statistical analysis might be beneficial, attempts to prove broad sociological theories by statistics was a "dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." *Id.* at 204.

[53] *Id.* The Court did not articulate why the relationship was insufficient, but merely concluded that it was not satisfied "that sex represents a legitimate, accurate proxy for the regulation of drinking and driving." *Id.* The Court expressly disapproved Goesaert v. Cleary, 335 U.S. 464 (1948), to the extent that it was inconsistent with *Craig.* 429 U.S. at 210 n.23; *see* note 19 *supra.*

[54] 429 U.S. at 204; *see* Note, *Women and the Draft: The Constitutionality of All-Male Registration,* 94 HARV. L. REV. 406, 410 (1980) (same standard of review is applied to gender-based classifications whether challenged by men or by women); *cf.* Caban v. Mohammed, 441 U.S. 380, 391-92 (1979) (law requiring illegitimate child's mother's consent prior to its adoption held unconstitutional where consent rights of unwed father were not considered).

[55] *See* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 153 (1980) (survivor's benefits paid to widows automatically upon death of husband, but widowers required to prove dependence upon deceased wife's earnings); Califano v. Goldfarb, 430 U.S. 199, 201-02 (1977) (plurality) (survivor's benefits automatically paid to widow, but widower must prove he received one-half of support from wife). Both *Wengler* and *Goldfarb* contained

for a gender-based distinction as a reasonable means of compensating women as a class for past economic discrimination have generally been upheld.[56] Other post-*Craig* developments included the acceptance of a more general justification for striking down gender-based classifications.[57] The Supreme Court has further clarified *Craig* by declaring that the burden of proof is on those defending the discriminatory statute to establish the claimed justification.[58]

In the Supreme Court's most recent consideration of gender-based discrimination, *Michael M. v. Superior Court*,[59] the Court restated its adherence to the *Craig* standard,[60] but ruled that a statutory rape law under which men alone could be held criminally liable did not unlaw-

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discussions as to whom the challenged statute actually discriminated against: the surviving male spouse or the deceased female wage-earner. The plurality in *Goldfarb* concluded that the distinction discriminated against the deceased female wage-earner, 430 U.S. at 208, while Justice Stevens, who concurred in the judgment, insisted that the provisions discriminated against the surviving male spouse. *Id.* at 218. The majority in *Wengler* apparently settled this controversy by ruling that the challenged statute discriminated against *both* men and women. 446 U.S. at 147.

[56] *E.g.*, Califano v. Webster, 430 U.S. 313, 317 (1977) (upholding provision of the Social Security Act allowing women to compute benefits with a more favorable formula than men). The *Webster* Court applied the *Craig* intermediate standard and concluded that the test had been satisfied, noting that the statutory scheme was more closely related to those upheld in *Kahn* and *Ballard* than to those invalidated in *Wiesenfeld* and *Goldfarb*. *Id.* The Court reasoned that the more favorable treatment accorded women was not the result of "archaic and overbroad generalizations" (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)), or of "the role-typing society has long imposed" on women (quoting Stanton v. Stanton, 421 U.S. 7, 15 (1975)). The Court further reasoned that the only discernible purpose for the more favorable treatment was to redress "society's longstanding disparate treatment of women." 430 U.S. at 317 (quoting Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977)). The Court concluded that such remedial, or benign, discrimination served an important governmental interest and that the gender classifications were substantially related to achieving the interest. 430 U.S. at 320-21.

[57] In Orr v. Orr, 440 U.S. 268 (1979), the Court held that an Alabama law imposing alimony obligations solely on males without regard to the dependency of either spouse carried with it "the baggage of sexual stereotypes." *Id.* at 283. The Supreme Court invalidated the law as an unjustified gender distinction in violation of the equal protection clause. *Id.* at 284. Justice Brennan commented, "Legislative classifications which distribute benefits . . . on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection." *Id.* at 283.

[58] Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980).

[59] 101 S. Ct. 1200 (1981).

[60] *Id.* at 1204; *see* Kirchberg v. Feenstra, 101 S. Ct. 1195, 1198 (1981) (applying *Craig* to hold unconstitutional a statute allowing husband the unilateral right to dispose of property jointly owned with wife).

fully discriminate on the basis of gender.[61] The Court reasoned that men and women were not similarly situated and that the law furthered an important governmental interest.[62] *Michael M.* indicated that the difficult burden of justifying a gender-based classification placed on the state can, in some instances, be overcome because of the importance of the governmental objective.[63] Further, the Supreme Court has shown a willingness to defer to the judgment of the legislative branch when considering gender-based classifications in some specific contexts, including state taxation[64] and immigration policy.[65]

Significantly, the Court has consistently taken a position of extreme deference to Congress when considering challenges to legislative enactments regarding national defense and military preparedness.[66] *Schlesinger v. Ballard*[67] is particularly relevant to an equal protection challenge to a renewed draft registration that excludes women. *Ballard,* unlike *Frontiero,*[68] involved important questions of military policy. The military promotion policy at issue in *Ballard* was rooted in statutory restrictions against women serving in combat,[69] and that pol-

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[61] 101 S. Ct. at 1206.

[62] *Id.* The statute's stated purpose was to prevent teenage pregnancies. *Id.* at 1205. In his majority opinion, Justice Rehnquist noted that the statute "reasonably reflects the fact that the consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male." *Id.* at 1208.

[63] Justice Brennan, one of four dissenters, asserted that the desirability of achieving the state's goal of preventing teenage pregnancies was overly emphasized to the detriment of "the fundamental question of whether the sex-based discrimination in the California statute is *substantially* related to the achievement of that goal." *Id.* at 1214.

[64] *See* Kahn v. Shevin, 416 U.S. 351, 355 (1974) (states have great discretion in determining classifications for tax purposes).

[65] *See* Fiallo v. Bell, 430 U.S. 787, 791, 795 (1977) (deferring to congressional judgment in upholding immigration restrictions giving preference to mothers of illegitimate children who are United States citizens, but withholding preference from the natural father).

[66] *See, e.g.,* Gilligan v. Morgan, 413 U.S. 1, 5, 10 (1973) (refused, on political question grounds, to address merits of plaintiff's request to undertake continuous judicial supervision of Ohio National Guard); Gillette v. United States, 401 U.S. 437, 462 (1971) (justified distinction between conscientious objectors on ground that Congress has compelling interest in maintaining efficient and workable draft system); United States v. O'Brien, 391 U.S. 367, 377-78 (1968) (extreme deference accorded Congress in upholding law making destruction of draft card a crime). *See generally* Roberts, *supra* note 24, at 82-89.

[67] *See* notes 39 through 47 and accompanying text *supra.*

[68] *See* notes 31 through 38 and accompanying text *supra.*

[69] 419 U.S. at 508. Combat restrictions in the Navy and Air Force are governed by 10 U.S.C. § 6015 (1976 & Supp. III 1979), which provides that "women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions," and *id.*

icy was the basis for Congress' exclusion of women from draft registration.[70] It is worthy of note that *Ballard* did not apply a different equal protection standard because of the military context of the case but, rather, stressed the deference due Congress when it acts pursuant to constitutional authority to raise and regulate armies.[71]

In the instant case the Court reasoned that since Congress was given constitutional authority to regulate the armed forces of the United States,[72] and since the MSSA, enacted pursuant to this constitutional grant of authority, was inherently concerned with national defense and military affairs,[73] and since Congress specifically had considered the question of the MSSA's constitutionality,[74] the Court should defer to the congressional findings.[75] The Court further reasoned that since registration was specifically linked to the possibility of induction, since any induction would be characterized by a need for combat troops,[76] and since women are precluded by both statute and policy

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§ 8549 (1976), which declares that women in the Air Force "may not be assigned to duty in aircraft engaged in combat missions." The Army and the Marine Corps prohibit the use of women in combat as a matter of established policy. PRESIDENTIAL RECOMMENDATIONS FOR SELECTIVE SERVICE REFORM, H.R. Doc. No. 265, 96th Cong., 2d Sess. 25-26 (1980).

[70] *See* S. REP. No. 826, 96th Cong., 2d Sess. 157, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2612, 2646-47 (policy precluding use of women in combat was primary reason for exclusion from registration system).

[71] 419 U.S. at 510.

[72] *See* note 2 *supra.*

[73] *See* note 2 *supra.*

[74] *See* S. REP. No. 826, 96th Cong., 2d Sess. 159-61, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2643, 2650 (concluding that a male-only draft was constitutional). After conducting hearings on the President's plan to register women, Congress rejected the proposal, primarily because of the perceived absence of any military need for registering women and because of combat restrictions on women. S. REP. No. 826, *supra,* at 157. Referring to testimony that 80,000 women conscripts could be usefully employed in the event of a draft, Justice Rehnquist's majority opinion stated that "Congress carefully evaluated the testimony . . . and rejected it in the permissible exercise of its constitutional responsibility." 101 S. Ct. at 2660. Justice Rehnquist distinguished the instant case from previous cases dealing with gender-based discrimination because, in the instant case, "Congress did not act 'unthinkingly' or 'reflexively and not for any considered reason.' " *Id.* at 2655.

[75] *Id.* at 2651-52, 2654. The Court, however, cautioned: "None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs . . . . Congress remains subject to the limitations of the Due Process Clause, . . . but the test and limitations to be applied may differ because of the military context." *Id.* at 2653.

[76] *Id.* at 2657. The Court relied on S. REP. No. 826, *supra* note 70, at 160, which explained that in any future draft facilitated by the registration plan, "the primary manpower need would be for combat replacements." 101 S. Ct. at 2657.

from combat positions,[77] then men and women were not similarly situated as to registration.[78] The Court concluded that since men and women were not similarly situated, since the exemption of women from registration was closely related to Congress' purpose in authorizing registration,[79] and since raising and supporting armies was an important governmental interest, Congress did not violate the equal protection component of the fifth amendment when it authorized the registration of only males under the MSSA.[80]

In dissent, Justice Marshall[81] argued that while the majority purported to apply the substantial relation test, it had not, in fact, done so.[82] He reasoned that since the challenged legislative enactment utilized a gender-based classification, the applicable test should be whether the classification is substantially related to the achievement of an important governmental objective.[83] Justice Marshall stated that since the parties defending the challenged classification must bear the burden of proof in demonstrating the substantial relationship between the discriminatory classification and the importance of the governmental interest served,[84] the Government was required to show that the registration of females would substantially impede its efforts to prepare for a draft of combat troops.[85] Further, Justice Marshall reasoned

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[77] 101 S. Ct. at 2657; *see* note 69 *supra*.

[78] 101 S. Ct. at 2658. The majority rejected the district court's finding that the military's need for women was irrelevant to the issue of their registration. *Id.* Concluding that men and women were not similarly situated for purposes of a draft or draft registration, the Supreme Court found that the reason women were exempted from registration was not that military needs could be met better by drafting only men. *Id.* The Court stated: "This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration." *Id.*

[79] *Id.*

[80] *Id.* at 2660.

[81] Joining Justice Marshall in dissent was Justice Brennan. *Id.* at 2662. Justice White delivered a separate dissent, also joined by Justice Brennan. *Id.* at 2661. Justice White rejected the majority's conclusion that Congress had decided that every position in the military should be filled by combat-trained personnel. *Id.* at 2661-62. Justice White, therefore, found no basis for discriminating between males and females in securing personnel for non-combat positions. *Id.* at 2662. Additionally, Justice White questioned the majority's finding that all the positions for which women would be eligible in wartime would be filled by female volunteers. *Id.* at 2661.

[82] *Id.* at 2666. Justice Marshall contended that the "similarly situated" analysis employed by the majority differed significantly from the "substantial relationship" test in *Craig v. Boren*. *Id; see* note 50 and accompanying text *supra*.

[83] 101 S. Ct. at 2666.

[84] *See* text accompanying note 58 *supra*.

[85] 105 S. Ct. at 2663, 2666. Justice Marshall agreed with the majority's conclusion

that since the registration of women would not hinder preparations for a draft of combat troops[86] and since there would be a need for women conscripts in the event of mobilization,[87] the Government had not met its burden of demonstrating that the exclusion of women from registration was substantially related to maintaining an adequate defense; therefore, the MSSA unconstitutionally discriminated between the sexes.[88]

By holding that male-only draft registration does not discriminate between the sexes in violation of the fifth amendment's guarantee of equal protection,[89] the Supreme Court has further confused an already confusing set of equal protection standards. The decision in the instant case adopts what could be called a "lower-middle-tier" analysis for gender-based classifications. It purports to accept the applicability of the *Craig* test but applies it with a large degree of deference to congressional decisionmakers.[90] Such an analysis, however, tends to focus

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that the government's interest in registration and possible conscription was an "important governmental interest" and that, consequently, the first part of the *Craig* test had been satisfied. Justice Marshall's argument centered, however, on whether the discriminatory means employed substantially served the statutory end. *Id.* at 2663.

[88] *Id.* at 2667. Justice Marshall suggested that preparations for a draft of combat troops could be effected by registering both men and women, but drafting only men if only men were needed. *Id.* Justice Marshall emphasized that the constitutionality of a statute governing conscription and of the statutes and policies prohibiting women from serving in combat positions was not an issue in the case. *Id.* at 2662. As an alternative system, Justice Marshall suggested a registration classification based on combat eligibility rather than on gender. He noted that under the challenged scheme a significant number of males ineligible for combat, either because of physical handicaps or their conscientious objector status, were nevertheless required to register. *Id.* at 2667 n.11.

[87] Justice Marshall relied on testimony before the Senate Armed Services Committee that the armed forces could usefully employ at least 80,000 women conscripts in supportive, non-combat functions from a total of 650,000 draftees needed in the event of a major European war. *Id.* at 2670, 2673. Justice Marshall acknowledged that if the law required men and women to be drafted in equal numbers military flexibility would be severly strained. He noted, however, that there had been no testimony that simultaneous induction of equal numbers of men and women draftees was either necessary or desirable. *Id.* at 2674.

[88] *Id.* at 2670. Justice Marshall rejected the majority's extreme deference to congressional action concerning military affairs as a substitution of "hollow shibboleths . . . for constitutional analysis," *id.* at 2675-76, and stated that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit." *Id.* at 2676 (quoting United States v. Robel, 389 U.S. 258, 263-64 (1967)).

[89] 101 S. Ct. at 2660.

[90] *See* 101 S. Ct. at 2654. The Court stated that the *Craig* standard was applicable, *id.*, but that "the test and limitations to be applied may differ because of the military context." *Id.* at 2653; *see* text accompanying note 71 *supra*.

not on the substantial relationship of the discriminatory means of implementation employed, but only on the important governmental interest served.[91] Taken together with *Michael M.*,[92] the instant case shows a disturbing willingness by the Supreme Court to discard *Craig's* rigid scrutiny of gender classifications in favor of an unbalanced emphasis on the importance of the governmental objective.[93] The dissent concedes the importance of the government interest involved, but correctly insists that under *Craig* a finding of an important governmental interest is by itself insufficient to uphold a sexually discriminatory statute.[94] The fundamental question of the gender-based discrimination's *substantial* relationship to the achievement of the government's goal was carefully avoided by the majority. Justice Rehnquist's heavy reliance upon congressional findings concerning the role of women in the military transformed the instant case into a separation of powers case treating sex-based discrimination as only a peripheral issue. As Justice Brennan's dissent in *Ballard* pointed out, there is a sort of perverse irony in basing the justification for one discriminatory policy, exclusion of women from registration, upon an even more pervasive policy of sex-based discrimination, combat restrictions on women.[95] In so doing, the majority's opinion will likely further the sexual stereotyping the Supreme Court has consistently disavowed since *Reed*.[96] The immediate constitutional impact of the instant case will likely be limited by the reasoning of the opinion;[97] however, the validity of *Craig* is now questionable in areas of traditional deference to Congress, such as the military. *Goldberg* presented the court with a unique factual situation clouded with issues of national security and separation of powers—the exclusion of women from compulsory military service. The majority's modified test rests on precedents according deference to Congress in military affairs,[98] and not on abandonment of the *Craig* standard.[99] For

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[91] *See* note 85 and accompanying text *supra*.

[92] *See* notes 59 through 63 and accompanying text *supra*.

[93] Justice Marshall stated, "Congressional enactments in the area of military affairs must, like all other laws, be *judged* by the standards of the Constitution." 101 S. Ct. at 2676.

[94] *See* note 63 and accompanying text *supra*.

[95] *See* note 47 *supra*.

[96] *See, e.g.*, Orr v. Orr, 440 U.S. 268, 273 (1979) (invalidating law fostering sexual stereotyping); Stanton v. Stanton, 421 U.S. 7, 15 (1975) (disavowing the tradition of role-typing imposed on women by society); Schlesinger v. Ballard, 419 U.S. 497, 508 (1975) (eschewing "archaic and overbroad generalizations").

[97] *See* notes 72 through 80 *supra*.

[98] 101 S. Ct. at 2651-55.

[99] *Id.* at 2654.

this reason, *Goldberg* should be readily distinguishable from most future gender-based discrimination cases, and *Craig* should remain controlling precedent for cases involving claims of sex discrimination in a non-military context.

John Sneed

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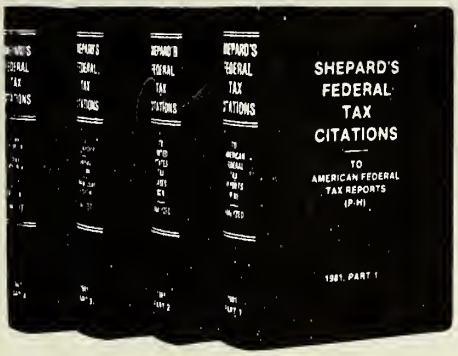

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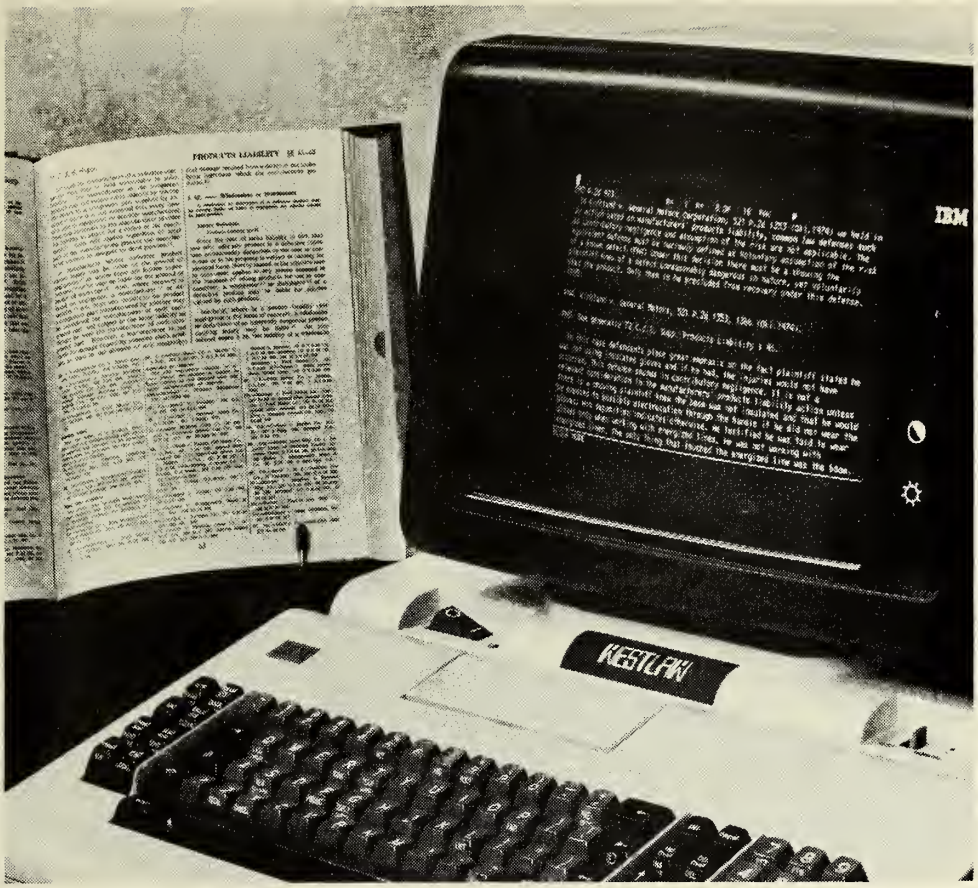

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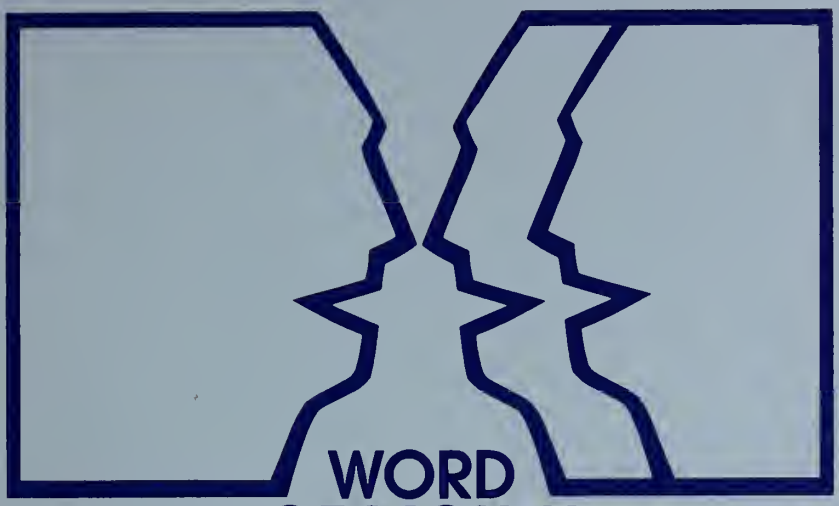

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